89-753

No. .....

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RON ANGELONE, Director, Nevada Department of Prisons, and BRIAN McKAY, Attorney General of the State of Nevada,

Petitioners,

v.

HENRY DEUTSCHER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether federal courts must require that a habeas petitioner prove that he has not abused the writ after the State specifically pleads abuse and whether a finding of abuse of the writ requires a determination that the petitioner made a conscious decision to withhold the claims previously.

II. Whether federal courts may consider the testimony of a state-appointed psychiatrist presented by the State in habeas proceedings and whether the circuit court below misstated the record and engaged in impermissible appellate fact finding in determining that the failure of trial counsel to present alleged mitigating evidence at the penalty hearing was prejudicial.

III. Whether Nevada's depravity of mind aggravating circumstance, which is further defined in jury instructions, violates the eighth amendment and whether the claim was barred by abuse of the writ.

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Nevada Department of Prisons,
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HENRY DEUTSCHER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COME NOW Ron Angelone[1], Director of the Nevada Department of Prisons, and Brian McKay, the Attorney General of

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[1] The named petitioner, Ron Angelone, as Director of the Department of Prisons, has custody of respondent Deutscher. The respondent warden below, Harol Whitley, was the former warden of the Nevada State Prison where respondent Deutscher was

Nevada, and file this petition for writ of certiorari seeking a reversal of the Opinion of the Ninth Circuit Court of Appeals.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on August 31, 1989, and is reproduced in Appendix A. Deutscher v. Whitley, ___ F.2d ___ (9th Cir. 1989). The federal district court's opinion which immediately preceded the circuit court litigation is reproduced in Appendix B.

JURISDICTIONAL STATEMENT

The federal district court reviewed the matter filed as a habeas corpus peti-

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housed. Respondent is now housed at the Ely State Prison. The named petitioner has been substituted as a party to this action in accordance with Rule 43(c) of the Federal Rules of Appellate Procedure. Petitioners are referred to hereinafter as the State.

tion in September of 1986. See 28 U.S.C. §§ 1331, 2241, 2254. An appeal was taken by respondent following the denial of habeas relief and the issuance of a certificate of probable cause. See id., §§ 1291, 2253. The State filed a cross appeal. The judgment of the Court of Appeals for the Ninth Circuit was filed on August 31, 1989. This petition for writ of certiorari is filed within sixty days of the judgment of the court of appeals below. Sup.Ct.R. 20. The jurisdiction of this Court is invoked under section 1254(1) of Title 28 to the United States Code.

STATUTORY PROVISIONS INVOLVED

Because this action concerns pleadings and review of a habeas corpus matter, rules for federal habeas actions are involved. Specifically, the State contends that respondent has abused the writ in violation of federal habeas rules.

See 28 U.S.C. § 2244(b) (reprinted in Appendix D); Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, Rule 9(b) (reprinted in Appendix E).

STATEMENT OF THE CASE

The State has lawful custody of Respondent Henry Deutscher [hereinafter referred to as DEUTSCHER] pursuant to a conviction for first degree murder and robbery following a jury trial on November 2, 1977, in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark [hereinafter referred to as trial court]. DEUTSCHER was sentenced to death by the jury following a penalty hearing for the August 16, 1977, murder of Darlene Joyce Miller. He was also sentenced to fifteen years for robbery. The jury found the aggravating circumstances of murder by a person previously convicted of a felony

involving the use or threat of violence to the person of another, murder committed during the commission or attempt to commit a forcible sexual assault, and murder involving torture, depravity of mind or mutilation of the victim.[2]

DEUTSCHER appealed to the Nevada Supreme Court represented by the same counsel which had represented him at trial. In October of 1979, the judgments of conviction and sentences of death and fifteen years in prison were affirmed. Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979) (reprinted in Appendix C). In January of 1980, DEUTSCHER, through his trial and appellate counsel, filed a federal habeas corpus petition in Las Vegas. The court retained jurisdiction over DEUTSCHER's petition but stayed the proceedings until he had exhausted state

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[2] See Nev. Rev. Stat. § 200.033 (1988).

post-conviction remedies. Ahlswede ex rel. Deutscher v. Wolff, Case No. CV-LV-80-19-RDF, Order (D. Nev., filed April 1, 1980).

In June of 1980, DEUTSCHER filed a state petition for post-conviction relief in the trial court. The petition was denied after the court found that the issues presented had been previously raised on direct appeal. The Nevada Supreme Court dismissed this appeal in July of 1981. Deutscher v. State, Case No. 13121, Order Dismissing Appeal (Nev., filed July 8, 1981).

DEUTSCHER returned to federal court and rejuvenated his pending habeas petition which was subsequently denied in August of 1982 in a twenty-three page written opinion. DEUTSCHER sought relief before the ninth circuit and was represented by new counsel who filed a brief on the merits and also requested the

court to remand so that other claims could be raised. The circuit court denied a remand, affirmed the denial of habeas relief, and denied a rehearing. Ahlswede ex rel. Deutscher v. Wolff, 720 F.2d 1108 (9th Cir. 1983). This Court denied certiorari in 1984. Deutscher v. Wolff, 469 U.S. 873 (1984).

In May of 1983, DEUTSCHER had filed a second petition for post-conviction relief in the trial court. Action on that petition had been stayed pending the final decision on the federal habeas corpus petition. In May of 1985, an amended petition was filed alleging inter alia that DEUTSCHER was denied the effective assistance of counsel at the penalty phase, on appeal and in post-conviction proceedings. An evidentiary hearing was held and the petition was ultimately denied in November of 1985. The Nevada Supreme Court affirmed the denial of

post-conviction relief. Deutscher v. Warden, Nevada State Prison, 102 Nev. 388, 724 P.2d 213 (1986).

DEUTSCHER immediately filed his second federal habeas corpus petition in September of 1986. The State moved to dismiss on the basis of successive petition or abuse of the writ and procedural default but also addressed the merits of the claims submitted by DEUTSCHER. The federal district court stayed the pending execution and ordered further briefing. The district court eventually issued rulings on various issues on November 20, 1986, April 1, 1987, June 25, 1987, October 22, 1987, December 17, 1987 and March 23, 1988. The June 25 order followed an evidentiary hearing on procedural default and the March 23 order followed an evidentiary hearing on the claim of ineffective counsel. Three of these orders were published with the last order being the

final judgment denying habeas relief. See Deutscher v. Whitley, 663 F.Supp. 793 (D. Nev., June 25, 1987); 671 F.Supp. 1264 (D. Nev., Oct. 22, 1987); 682 F.Supp. 1098 (D. Nev., Mar. 23, 1988) (reprinted in Appendix B). A certificate of probable cause was granted after DEUTSCHER filed a notice of appeal. The State also filed a notice of cross-appeal and, following full briefing and oral argument, the three-judge panel reversed the denial of a writ of habeas corpus finding that trial counsel was ineffective for having failed to present mitigating evidence at the capital sentencing hearing and that the error was prejudicial. The circuit court denied relief in all other respects but determined that there was no abuse of the writ and that, even though its application was harmless error, Nevada's "depravity of mind" aggravating circumstance was unconstitutional. Deutscher v. Whitley, ___

F.2d ___ (9th Cir., filed Aug. 31, 1989) (Appendix A). The State now seeks review of the circuit court's opinion with this petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

There are special and important reasons for granting the writ. The Ninth Circuit in essence determined that a second-time federal habeas petitioner need not be held to the task of proving that he has not abused the writ even after the State has specifically pled the defense. Moreover, the circuit court held that abuse of the writ is not established unless it is shown that the petitioner consciously withheld the claims during the previous habeas proceedings. These rulings are in conflict with the decisions of this Court and other federal circuit courts.

The Ninth Circuit improperly asserted that the testimony of a state-appointed

psychiatrist in federal habeas proceedings should not be considered. The ruling is in conflict with the decisions of this Court and other federal circuit courts. The State presented the testimony to demonstrate what the psychiatrist would have been able to advise DEUTSCHER's trial counsel had a thorough mental history investigation been conducted prior to the penalty hearing. The testimony also demonstrated what any psychiatrist with this information would have said so that trial counsel would not be considered ineffective in failing to present the information. The lower court also engaged in impermissible appellate fact finding contrary to the holdings of this Court. The court misstated the record and made findings of fact not supported by the record and contrary to those of the district court in concluding that attorney errors in failing to investigate

and present alleged mitigating evidence were prejudicial.

Finally, in dicta, the circuit court erroneously struck down Nevada's aggravating circumstance of depravity of mind as violative of this Court's holding in Godfrey v. Georgia. The claim should have been barred by abuse of the writ because, while it was raised on direct appeal, the claim was not raised in the first federal habeas proceedings. The substantive ruling is also in conflict with this Court's decisions as the depravity-of-mind term was adequately defined in jury instructions such that the jury's discretion was properly channeled. The rulings of the Ninth Circuit, if allowed to stand, would seriously undermine the ability of the states within the Ninth Circuit jurisdiction to obtain rulings of finality, rulings consistent with the record, and rulings in

harmony with those of this Court and other federal circuits in capital litigation.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT HAS DECIDED IMPORTANT QUESTIONS OF LAW IN WAYS WHICH CONFLICT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUIT COURTS BY NOT REQUIRING THAT A HABEAS PETITIONER PROVE THAT HE HAS NOT ABUSED THE WRIT AFTER THE STATE SPECIFICALLY PLED ABUSE AND BY HOLDING THAT A FINDING OF ABUSE OF THE WRIT DOES NOT REQUIRE A DETERMINATION THAT THE PETITIONER MADE A CONSCIOUS DECISION TO WITHHOLD THE CLAIMS PREVIOUSLY.

Despite the fact that the State filed a motion to dismiss the habeas petition on abuse-of-the-writ principles, and despite the fact that the district court issued several orders, the district court totally failed to rule on the State's claim of abuse of the writ. The Ninth Circuit also glossed over the issue by simply declaring,

> We held [in Harris v. Pulley, 852 F.2d 1546, 1572 (9th Cir. 1988)] that because counsel had not made a conscious decision

> to withhold claims, engage in piecemeal litigation, vex, harass, or delay, the successive petition was not an abuse of the writ. Deutscher's previous counsel similarly made no conscious decision to withhold claims. The claims simply did not occur to counsel. The district court correctly held that Deutscher's petition was not an abuse of the writ.

Deutscher v. Whitley, ___ F.2d at ____, Slip Op. at 10498 (emphasis added) (Appendix A). The record clearly demonstrates that the district court did not rule at all with regard to the claim that this second federal habeas petition was an abuse of the writ. Nor did the district court or the court of appeals require that DEUTSCHER present any reasons for not having raised all of his claims in the initial habeas petition. The district court only made several rulings with regard to the claim of the State that DEUTSCHER had procedurally defaulted on many of his claims and did rule that

many of the claims did not occur to counsel.

The law of this Court and of most other federal circuit courts is that abuse of the writ must be specifically pleaded by the state. Price v. Johnston, 334 U.S. 266, 292 (1948); Jones v. Estelle, 722 F.2d 159, 164 (5th Cir. 1983) (en banc), cert. denied, 466 U.S. 976 (1984). Once abuse has been pled, "the prisoner has the burden of answering that allegation and of proving that he has not abused the writ." Price v. Johnston, 334 U.S. at 292.

In this case, the State specifically pled abuse of the writ in its initial pleading, a motion to dismiss, filed on October 9, 1986. After numerous orders were issued by the district court, the State was required to file an answer to those claims which the district court determined had not been procedurally

defaulted. In its partial answer to the remaining habeas claims filed on January 6, 1987, the State again emphasized that it was relying on abuse of the writ as well as procedural default. Nevertheless, the district court never put DEUTSCHER to the task of proving that he had not abused the writ and the Ninth Circuit simply ignored this fact.

Not only did the Ninth Circuit ignore the record, the circuit court also relied on incorrect law in the circuit regarding abuse of the writ. The court continued to rely on two previous cases which set forth a three-part test for determining whether there has been an abuse of the writ under Rule 9(b) of the Rules Governing Section 2254 Proceedings in District Courts. The Ninth Circuit has held, "Previously unadjudicated claims must be decided on the merits unless (1) the petitioner has made a

conscious decision deliberately to withhold them, (2) is pursuing 'needless piecemeal litigation,' or (3) has raised the claims only to 'vex, harass, or delay.'" Deutscher v. Whitley, ___ F.2d at ____, Slip Op. at 10498 (emphasis added) quoting Harris v. Pulley, 852 F.2d at 1572; Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir. 1985). To the knowledge of counsel for the State, the Ninth Circuit is the only circuit which requires a finding of a conscious decision to withhold claims.

The Rules Governing Section 2254 Cases provide for the dismissal of claims in a successive habeas petition which were omitted from a prior petition. "A second or successive petition may be dismissed . . . if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted

an abuse of the writ." 28 U.S.C. foll. § 2254, Rule 9(b). Most of the claims raised by DEUTSCHER in his second federal petition were not raised in the first federal petition. Most federal circuits which have addressed this issue have determined that a petitioner must demonstrate that "the failure to present the ground in the prior proceeding was-neither the result of an intentional abandonment or withholding nor the product of inexcusable neglect." Witt v. Wainwright, 755 F.2d 1396, 1397 (11th Cir.), cert. denied, 470 U.S. 1039 (1985) (emphasis added). See Coleman v. Saffle, 869 F.2d 1377, 1380 (10th Cir. 1989); Bell v. Lynaugh, 858 F.2d 978, 982 (5th Cir. 1988); Clanton v. Muncy, 845 F.2d 1238, 1240-41 & n.* (4th Cir. 1988).

The Ninth Circuit apparently stands alone in its determination that there must have been a conscious decision to

withhold claims previously rather than inexcusable neglect. This has been specifically rejected by the other circuits. In 1983, the Fifth Circuit stated,

> [W]e find no indication that Congress in enacting Rule 9(b) meant to limit its scope to bar only those claims that had been deliberately and knowingly withheld by the petitioner himself, making no allowance for the agency role of the petitioner's competent counsel. . . . Only in very rare cases will it appear that a petitioner represented by counsel made a personal determination to withhold a habeas claim. If 9(b) were read to bar only those petitioners, the congressional purpose would be stymied. In choosing between two plausible readings of a statute, we will adopt that which more faithfully effectuates the legislative intent while infringing on no recognized individual right.

Jones v. Estelle, 722 F.2d at 166 (footnotes omitted). Similarly, the court later stated that "the proper standard for abuse of the writ is not whether a petitioner intentionally bypassed an

issue at the time of the earlier petition, but 'whether he withheld it without legal excuse when he filed his earlier petition.'" Bell v. Lynaugh, 858 F.2d at 982, quoting Hamilton v. McCotter, 772 F.2d 171, 176 (5th Cir. 1985); Jones v. Estelle, 722 F.2d at 163.

For all intents and purposes, the doctrine of abuse of the writ is a dead letter in the Ninth Circuit. The holdings in Richmond, Harris, and Deutscher require a finding of a conscious decision on the part of a petitioner or his counsel to withhold certain claims. Other circuits have recognized that it is a rare case in which the state will be able to demonstrate such a conscious decision.[3]

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[3] The Ninth Circuit has also indicated that there is no abuse of the writ even when a habeas petitioner deliberately withholds from his first petition claims which have not yet been exhausted in state

This Court has not specifically ruled as to whether an abuse of the writ must result from a conscious or deliberate decision or whether it may be the result of inexcusable neglect. The Ninth Circuit line of cases relies upon this Court's decision in Sanders v. United States, 373 U.S. 1 (1963). That decision, however, involved a federal prisoner filing a second motion under 28 U.S.C. § 2255 after a prior motion had been denied as conclusory. This Court stated that the second motion was not an abuse of the writ. The Court discussed successive applications raising different grounds and relied on the previous decision in Fay v. Noia, 372 U.S. 391 (1963). The

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court and subsequently raises those claims in the second federal habeas petition after exhaustion. Neuschafer v. Whitley, 860 F.2d 1470, 1475 (9th Cir. 1988), cert. denied sub nom. Demonsthenes v. Neuschafer, Case No. 89-259 (Oct. 10, 1989).

decision also preceded the present-day codification of Rule 9. The Court has also indicated that a petition raising new claims should be dismissed when the claims "could and should have been raised in [the] first petition for federal habeas corpus" and there is no explanation why a claim was not made. Woodard v. Hutchins, 464 U.S. 377, 379-80 (1984) (per curiam) (Powell, J., concurring with four other justices). See also Antone v. Dugger, 465 U.S. 200 (1984) (per curiam).[4]

This Court should grant certiorari to review the basis for the decisions of the Ninth Circuit and the lower district court in not requiring DEUTSCHER to demonstrate why he did not raise in his

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[4] This Court has had occasion to define the term "ends of justice" as it relates to the review of claims raised in prior habeas petitions. See Kuhlmann v. Wilson, 477 U.S. 436 (1986).

first federal petition the claims he raised in his second petition[5]. Additionally, certiorari should be granted so that this Court may resolve the conflict between the Ninth Circuit and other circuits as to the standards federal courts should utilize in determining when the filing of new claims in a successive habeas petition constitutes an abuse of the writ.

II. THE CIRCUIT COURT DECIDED IMPORTANT QUESTIONS OF LAW IN WAYS WHICH CONFLICT WITH THE DECISIONS OF THIS COURT BY HOLDING THAT FEDERAL COURTS MAY NOT CONSIDER THE TESTIMONY OF A STATE-APPOINTED PSYCHIATRIST PRESENTED BY THE STATE IN HABEAS PROCEEDINGS AND BY MISSTATING THE RECORD AND ENGAGING IN IMPERMISSIBLE APPELLATE FACT FINDING IN DETERMINING THAT THE FAILURE OF TRIAL COUNSEL TO PRESENT ALLEGED MITIGATING EVIDENCE AT THE PENALTY HEARING WAS PREJUDICIAL.

Another disturbing aspect of the circuit court's opinion which actually

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[5] Deutscher may claim that he could not have raised the claim of ineffective counsel in his first federal habeas

resulted in the reversal of the district court's denial of the writ of habeas corpus was the determination that DEUTSCHER had shown prejudice resulting from the failure of his trial counsel to investigate and present mental disorder evidence at the sentencing hearing in 1977. The circuit court decision was contrary to the decision of the district court, the state supreme court, and the state post-conviction court. The circuit court opinion also erroneously relied upon the decision of this Court in Estelle v. Smith, 451 U.S. 454 (1981).

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petition because he was still represented by counsel which represented him at trial and all other previous proceedings. In the first place, the State contends that this should not be an automatic excuse for abusing the writ and, secondly, the lower courts did not find that counsel was ineffective during the first federal habeas proceedings. This is also not an excuse for failing to raise the numerous other issues.

First of all, this claim of ineffective assistance of counsel should have been barred by abuse of the writ as discussed above. DEUTSCHER claimed that his trial counsel failed to present certain mitigating evidence at his sentencing hearing. He did not raise this claim in his first federal habeas petition. Certainly, DEUTSCHER was represented during the first federal habeas proceedings by his trial counsel but, as noted above, the district court and circuit court never required DEUTSCHER to present a "reasonable justification for his failure to raise this claim in a prior petition. . . ." See Demps v. Dugger, 874 F.2d 1385, 1393 (11th Cir. 1989). The fact that DEUTSCHER had the same counsel should not be an automatic excuse for failing to raise the issue in the prior proceedings.

The second error committed by the

Ninth Circuit was in its ruling regarding the admissibility of testimony by a state-appointed psychiatrist at the federal evidentiary hearing and in the determination that DEUTSCHER proved prejudicial attorney error. See Strickland v. Washington, 466 U.S. 668, 687 (1987) (counsel is ineffective only if counsel's performance was deficient and the petitioner can show that the deficient performance prejudiced his defense). A review of the ineffective counsel claims and evidence presented is necessary for an understanding of the errors of the Ninth Circuit.

A. Ineffective Counsel Claims and Evidence Presented at the Hearings.

DEUTSCHER made several claims that his trial counsel was ineffective for having failed, inter alia, to investigate or present mitigating evidence during the penalty phase of the trial. Of the

approximate seventeen claims of attorney error, five were allegations of a failure to investigate or present mitigating evidence. The State must concede that DEUTSCHER's trial counsel unreasonably failed to investigate DEUTSCHER's mental history background as found by the federal district court. See Deutscher v. Whitley, 682 F.Supp. at 1103. The State has argued all along, however, that the failure to investigate or present mitigating evidence of this nature was not prejudicial.

DEUTSCHER's primary claims were that, had his background been investigated, his trial counsel would have found that DEUTSCHER suffered from mental illness, had been involuntarily civilly committed at various times in 1963 and had been diagnosed as a paranoid schizophrenic. Further asserted evidence not discovered was that DEUTSCHER was born

substantially premature as a result of a beating his mother received from his father, that he was beaten frequently by his father, that he was slow in school, nervous and a loner, that he was generally nonviolent and easygoing but had trouble when he drank, that he treated his family well, and that he could not have intended to kill. As such, allegedly it was not unusual for such a person to develop the mental problems DEUTSCHER supposedly had and to develop symptoms which would include uncontrollable explosions of violence, an inability to control his actions, and a failure to be conscious of what he is doing. DEUTSCHER claimed that stress and alcohol to which he was purportedly subjected in this case, increased susceptibility to an extreme outburst.

At the state post-conviction and federal habeas corpus hearings,

DEUTSCHER's counsel presented some of DEUTSCHER's hospital records from the State of New York during a stay in 1963. He had been diagnosed as having "schizophrenia, paranoid type" with apparently uncontrollable outbursts of anger. There appeared in the records to have been an abnormal electroencephalogram. Some of the records indicated that the diagnosis was associated with alcoholism and pathological intoxication. These records were obtained by post-conviction counsel and were relied upon in the post-conviction hearings by a psychiatrist, Dr. William O'Gorman, who had examined DEUTSCHER upon his arrest in 1977. At the 1985 state post-conviction hearing, Dr. O'Gorman responded to several hypothetical questions and, based upon personal history provided in the form of hypotheticals or by DEUTSCHER and his family, gave an opinion that DEUTSCHER may have

been suffering from a mental disturbance at the time of the commission of the crime in 1977. He did, however, state that the problem in 1963 may have been resolved with treatment.

Dr. Franklin D. Master had also examined DEUTSCHER in 1977. An affidavit of Dr. Master was submitted at the 1985 post-conviction hearing through which Dr. Master opined that the original diagnoses of schizophrenia found in the 1963 New York medical records would not have been the original diagnoses if the psychiatric profession in 1963 had possessed the knowledge it has today. Dr. Master stated that the diagnoses would have been "toxic psychosis" as the treatment was for behavioral problems brought on my alcoholism. The fact that an EEG administered to DEUTSCHER in 1963 was abnormal did not appear significant to Dr. Master given DEUTSCHER's alcohol addiction. Subse-

quent records indicated that this problem was corrected. Dr. Master stated that, had he had access to these and other records at the time he made his evaluation of DEUTSCHER in 1977, his opinion would have been the same that DEUTSCHER was not suffering from any organic brain disease during the commission of the crimes and that DEUTSCHER "has an anti-social personality and that he is a dangerous man."

The first important point here with regard to the Ninth Circuit opinion is that neither Dr. O'Gorman nor Dr. Master testified in the 1977 trial. Early in the case, both psychiatrists were appointed at the request of the defense to examine DEUTSCHER for competency and sanity. Both doctors determined that DEUTSCHER was competent and sane. As a result of this, defense counsel at the time decided there would be no insanity

defense.

The testimony of Dr. O'Gorman was presented by DEUTSCHER's post-conviction counsel during state proceedings in 1985. The affidavit of Dr. Master was presented by the State at that time and the testimony of Dr. Master was later presented during the 1988 federal habeas corpus evidentiary hearings. The State had also obtained and presented at the federal evidentiary proceedings New York court records relating to DEUTSCHER's 1968 conviction for rape and sodomy. These records consisted of the sentencing transcript, the police report, the presentence investigation report, the transcript of DEUTSCHER's testimony, and DEUTSCHER's New York Prison psychiatric records following his incarceration in that state. None of these records had been obtained by DEUTSCHER's post-conviction counsel to that date but these

records were relied upon by Dr. Master in his testimony and by the federal district court in finding that no prejudice had inured to DEUTSCHER in the failure of his trial counsel to investigate his mental history. None of these records were either seen or relied upon by Dr. O'Gorman in 1977 or in 1985.

B. The Circuit Court Erroneously Rejected Consideration of the Testimony of a Psychiatrist Presented in the Federal Habeas Proceedings.

The Ninth Circuit opinion in this case stated, among other things,

> Moreover, much of Dr. Master's testimony would have been inadmissible at the penalty phase hearing. Dr. Master was appointed by the trial court to determine Deutscher's competence to stand trial. When "a psychiatrist designated by the trial court to conduct a neutral competency examination" goes beyond simply reporting on competence and testifies at the penalty phase, he becomes like "an agent of the State recounting unwarned statements made in a post-arrest custodial setting," and use of his testimony could violate the Fifth Amend-

> ment. Estelle v. Smith, 451 U.S. 454, 467 (1981).

Deutscher v. Whitley, ___ F.2d at ____, Slip Op. at 10509 (emphasis added). This holding by the Ninth Circuit was erroneous.

The opinion of the Ninth Circuit that Dr. Master's testimony "could violate the Fifth Amendment" was irrelevant here as well as incorrect. Dr. Master did not testify at the penalty phase and would not have been called unless the defense strategy was to establish a "mental status" defense with psychological evidence. In this situation, the rule in Estelle v. Smith, 451 U.S. 454 (1981), would not be violated. Buchanan v. Kentucky, 483 U.S. 402, 421-24 (1987). Moreover, it was defense counsel who, in 1977, requested the psychiatric evaluations by these doctors. To the extent that the Ninth Circuit relied on Estelle

in dismissing the testimony of Dr. Master from consideration in these habeas proceedings, the Ninth Circuit ruling was clearly in conflict with the decisions of this Court and other circuit courts. See Woomer v. Aiken, 856 F.2d 677, 679-82 (4th Cir. 1988), cert. denied, 109 S.Ct. 1560 (1989); Riles v. McCotter, 799 F.2d 947, 953-54 (5th Cir. 1986). There is no question that psychiatric testimony can be presented if it is in accordance with the requirements of Estelle v. Smith. See Barefoot v. Estelle, 463 U.S. 880, 896-904 (1983).

Additionally, this psychiatric testimony of Dr. Master was presented in a habeas corpus setting. As this Court knows, habeas corpus is civil in nature. See Hilton v. Braunskill, 107 S.Ct. 2113, 2118 (1987). As such, the presentation in these habeas proceedings of the testimony of Dr. Master did not violate

DEUTSCHER's fifth or sixth amendment rights. See Allen v. Illinois, 478 U.S. 364 (1986).

C. The Circuit Court Misstated the Record and Made Factual Findings Not Supported by the Record.

The remaining error in the Ninth Circuit opinion was with regard to what Dr. Master did say in his testimony. The federal district court had determined that trial counsel's deficiencies in not obtaining DEUTSCHER's mental health history were not prejudicial. The Ninth Circuit, on the other hand, said,

> Dr. Master testified that Deutscher was not mentally ill, but rather had no social conscience. The court speculated that the jury might have considered this lack of social conscience testimony as further aggravation. Dr. Master's testimony might have been successfully rebutted. Dr. Master did not take into account Deutscher's premature birth, fetal injury, or childhood beatings. Dr. Master admitted that Deutscher would do well in an institutional setting. In addition, Dr. Master might have

> been impeached by evidence that Dr. Master has been an over-zealous prosecution witness in other murder trials.

Deutscher v. Whitley, ___ F.2d at ___, Slip Op. at 10509. The Ninth Circuit is the court speculating and misreading the record. First of all, Dr. Master was specifically asked to assume that there would have been testimony in 1977 that DEUTSCHER was born substantially premature as a result of beatings his mother received from his father, that DEUTSCHER "was beaten frequently from his father, he was slow in school, nervous, [a] loner, had trouble when he drank," that he was generally nonviolent and easygoing but had trouble when he drank, and that he treated his family well and could not have intended to kill. Transcript of Proceedings of January 6, 1988 at 101. The doctor specifically stated that those facts would not be consistent with his

opinion of DEUTSCHER's status in 1977 as history from independent sources appeared to indicate a repeated history of violent aggressive behavior toward persons close to DEUTSCHER and in his family as well as to outsiders. And, even though he may have had disagreement with these facts, if they had been established, Dr. Master stated that his original opinion would still stand.

Nor is it correct to say that the record showed that "Dr. Master admitted that Deutscher would do well in an institutional setting." In fact, Dr. Master was relying on the 1968 New York criminal court records and the statements of the judge at the time of sentencing to support his conclusions. Dr. Master was referring to DEUTSCHER when he said,

> That he is an individual that grew up in a household with a great deal of violence and battering and one point it was mentioned [sic] his mother

used a frying pan to batter the father in the head and that there was an assault and battery in Florida and both of the first two marriages ended because of repeated batterings of wives and then the violent assault that led to the conviction of sexual sodomizing assault [sic] on a teenage high school girl in New York in which the judge at the sentencing produced a very strong condemning lecture directed towards Mr. Deutscher and then that coupled with the 1977 charge that there seemed to be a general pattern of continued sporadic violence and coupled with a reporting of Mr. Deutscher as well behaved and meek and mild mannered within a confinement setting which again is not atypical with the diagnoses of antisocial personality. That given an individual smaller and weaker and helpless and the freedom to act on them, violent aggression to dominate will come out.

Faced with overwhelming authority and the lack of opportunity to be violent, the individual submits. Far from being mental illness, that's really pretty adaptive behavior. It's antisocial behavior, it's behavior that doesn't conform to social value systems of a civilized, orderly society but it's not considered mental illness.

Id. at 94-95. Additionally, when directly asked to discuss the opinion of an asserted attorney expert previously called by DEUTSCHER's counsel, Dr. Master talked about DEUTSCHER's adjustment to his institutionalization:

> Well, I think that certainly in his institutionalization there currently he's in maximum security and I'm not certain that he has all that much opportunity to become sexually and physically aggressive with a relatively defenseless female.
>
> I'm not sure what to say. I think that if he were really a safe risk I would assume that the four armed gentlemen in uniform could leave and it wouldn't matter.

Id. at 96. The last paragraph was stricken as not responsive to the question. Finally, Dr. Master was asked about his view of some of the statements in the New York prison records to the effect of DEUTSCHER making a good institutional adjustment with a good prison

record: "I think that all we can do is to accept that part of it as their stated observations that his behavior within confinement was good behavior." Id. at 97. Thus, at no time did Dr. Master admit that DEUTSCHER would do well in an institutional setting.

Most disturbing is a statement by the Ninth Circuit: "In addition, Dr. Master might have been impeached by evidence that Dr. Master has been an overzealous prosecution witness in other murder trials." Deutscher v. Whitley, ___ F.2d at ___, Slip. Op. at 10509. There was no evidence whatsoever presented at the federal habeas evidentiary proceedings or in any other part of the record to support this kind of determination. As a matter of fact, at the federal habeas evidentiary hearing, Dr. Master testified that he had previously had occasion to testify for both the prosecu-

tion and the defense on various occasions.

As with most of the other so-called factual findings made by the Ninth Circuit, this statement that Dr. Master might have been impeached appears also to have been taken from DEUTSCHER's opening brief to that court. In that brief, DEUTSCHER cited two Nevada Supreme Court cases which held that it was improper for Dr. Master in those specific cases to have been allowed to testify as to admissions made by the defendant during a psychiatric examination or to state his opinion as to the credibility of a defendant he had interviewed. See Winiarz v. State, ___ Nev. ___, 752 P.2d 761 (Adv. Op. 9, 1988); McKenna v. State, 98 Nev. 38, 639 P.2d 557 (1982). In the 1982 case, the state supreme court found a violation of the rule announced in the 1981 Supreme Court case of Estelle v.

Smith. In the 1988 case, the state supreme court found that the trial court erred in allowing the doctor to testify over objection to the state of mind of the defendant and as to her credibility. The court also relied on the previous decision in McKenna. Thus, both decisions related to evidentiary rulings. There was and is no evidence supporting the finding of the Ninth Circuit that Dr. Master was "an overzealous prosecution witness in other murder trials."

D. The Facts Support the District Court Finding of No Prejudice.

What has actually happened is that the Ninth Circuit took it upon itself in this case to make factual findings not supported by the record and totally contrary to the findings of the lower district court. The federal district court stated,

> The substantial weight of the psychiatric evidence presented

> to this Court indicates that the petitioner is not mentally ill, and that he instead lacks a social conscience. The Court is aware that the petitioner need not have been diagnosed as having a full fledged mental illness in order for the psychiatric evidence to help avoid the death penalty. In this case, however, it appears that the evidence would have stood an equal chance of harming the petitioner's case more than it helped. A jury, presented with evidence tending to show that the petitioner was abused as a child, and that he failed to develop normal social senses, could easily find that these facts did not outweigh the aggravating circumstances presented by the state. Indeed, it seems likely that telling the jury that the petitioner lacks a social conscience is likely to be found as an aggravating circumstance itself. . . . In light of the extremely equivocal nature of the psychiatric evidence which the jury in this case would have heard, the Court cannot say that there is a reasonable probability that the outcome of the penalty phase hearing would have been different had the evidence been produced.

Deutscher v. Whitley, 682 F.Supp. at 1104 (citing cases). The district court then

outlined the aggravating evidence which the jury did hear and concluded that this evidence also buttressed the conclusion of the federal district court. What the circuit court has now done in making findings contrary to the district court is to "engage in impermissible appellate fact finding." Amadeo v. Zant, 108 S.Ct. 1771, 1780 (1988). See Fed.R.Civ.P. 52(a). The circuit court completely misstated the record and even relied on alleged facts not presented to the district court. This is in conflict with the cases decided by this Court.

Finally, what is important to note here is the overwhelming evidence presented by the State to demonstrate that the lack of investigation by DEUTSCHER's trial counsel was not prejudicial. Certainly, the testimony of Dr. Master was very beneficial for the State during the federal habeas proceedings. Neverthe-

less, the most damaging evidence was the documentary evidence the State presented. As noted above, DEUTSCHER was treated at a New York Hospital in 1963. The documents from DEUTSCHER's 1968 criminal case, in which he was convicted of attempted rape, attempted sodomy and assault, indicate that DEUTSCHER underwent a mandatory examination of his mental condition by two psychiatrists who were to provide written reports prior to imposition of sentence. In the sentencing transcript, the court referenced the examination previously conducted by the psychiatrists, noted DEUTSCHER's prior prison stays and trouble in and outside of New York and stated, "Your general community history is rather poor." Finally, the court, in sentencing DEUTSCHER to ten years in prison for the attempted sodomy and five years on the assault, stated, "As far as I'm concerned, Mr.

Deutscher, you are a violent person, you're a danger to the community to be left at large."

The police report regarding the 1967 New York offense showed that DEUTSCHER had thrown the female victim to the ground, ripped open her blouse, attempted to pull down her bra, unzipped his pants and tried to force the victim to perform an unnatural act. DEUTSCHER subsequently slapped the victim across the face, punched her over her eye and inflicted lacerations. These are facts very similar to what happened to DEUTSCHER's victim in 1977.

The pre-sentence investigation report also related the facts of the 1967 New York case as well as DEUTSCHER's previous court and institutional record. The social history of the offender indicated that his father appeared to be a "beater" and beat his mother, DEUTSCHER

and his sister. With regard to mental condition, the report referenced DEUTSCHER's admission to the state hospital in 1963. The report showed that DEUTSCHER had beaten both his first and second wives.

Finally, the final report in the psychiatric records from the New York Department of Corrections from 1968 until 1973 indicated that DEUTSCHER disclosed no evidence of any psychiatric disorder. The reports of several other psychiatrists diagnosed him as having an alcoholic addiction and personality disorder. One psychiatrist even referred to the prior New York hospitalization and stated "in retrospect it seems somewhat doubtful that the diagnoses as established at Pilgrim had been very well substantiated." None of this information was available to Dr. O'Gorman for his 1985 testimony and, in fact, DEUTSCHER's habeas

counsel had not obtained this information.[6]

Thus, the factual findings made by the district court are well substantiated by the record. The factual findings made by the Ninth Circuit are not supported by the record and are contrary to the findings made by the federal district court. The circuit court acted contrary to the rulings of this Court in making these findings. The circuit court, unlike the

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[6] An additional important fact here is that all of the psychiatric evidence presented by DEUTSCHER could only be potentially helpful if the facts surrounding the crime in 1977 showed that he was intoxicated or had been taking drugs such that his "uncontrollable" explosion of violence would have been more likely to occur. But there was testimony at trial and during the habeas proceedings to prove that DEUTSCHER had taken no drugs and was not intoxicated. Therefore, the statement by the Ninth Circuit that Dr. O'Gorman "would have testified that stress and alcohol can make such an outburst more likely and that DEUTSCHER's story that he had blacked out was consistent with the symptoms of this disorder" was without basis.

district court, also acted contrary to the decisions of this Court and other circuits in finding prejudice from the failure to present alleged mitigating evidence.[7] This Court should grant

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[7] Contrary to the Ninth Circuit's denial that it would presume prejudicial attorney error in such a case as this, it appears that the court did just that. The district court, however, heard the witnesses, reviewed the important documentary evidence and even compared this case to two others where no prejudice was found from a failure of counsel to introduce amazingly similar evidence. See Whitley v. Bair, 802 F.2d 1487, 1495 (4th Cir. 1986), cert. denied, 480 U.S. 951 (1987) (no prejudice from failure to present evidence of child abuse and injury to head or psychiatric testimony of organic brain dysfunction causing inability to control extreme impulses in light of negative information that would have accompanied the evidence); Thompson v. Wainwright, 787 F.2d 1447, 1454 (11th Cir. 1986), cert. denied, 481 U.S. 1042 (1987) (evidence of difficult youth, unsavory codefendant and limited mental capacity would not have altered jury decision in light of evidence of defendant's participation in brutal torture murder). See also Strickland v. Washington, 466 U.S. at 699-700 (evidence that defendant a good person and psychiatric testimony that defendant under considerable emotional stress would not have

certiorari and correct the errors.

III. THE NINTH CIRCUIT HAS DECIDED IMPORTANT QUESTIONS OF LAW WHICH CONFLICT WITH THE DECISIONS OF THIS COURT BY HOLDING THAT NEVADA'S DEPRAVITY OF MIND AGGRAVATING CIRCUMSTANCE VIOLATES THE EIGHTH AMENDMENT AND THE CLAIM WAS NOT BARRED BY ABUSE OF THE WRIT.

The error committed by the ninth circuit in its holding that DEUTSCHER had not abused the writ was magnified by the circuit court's finding that Nevada's depravity-of-mind aggravating factor was unconstitutional. This is because this particular claim was presented by DEUTSCHER in his direct appeal to the state supreme court and omitted from his first federal habeas petition.

The circuit court first mentioned this issue by stating, "Procedural default does not apply to this claim

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changed outcome in light of overwhelming aggravating factors and fact that some evidence would have been harmful).

because the claim was properly raised in state court." Deutscher v. Whitley, ___ F.2d at ____, Slip Op. at 10502 (Appendix A). The circuit court returned to the substance of this issue at the end of its opinion when it superficially relied upon previous decisions of this court. Id. at ___, Slip Op. at 10511-13, citing Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988); Godfrey v. Georgia, 446 U.S. 420, 427 (1980). The circuit court's treatment of this issue further demonstrates the need for this court to grant certiorari.

A. The Challenge to the Torture, Depravity of Mind or Mutilation Aggravating Circumstance was Barred by Abuse of the Writ.

DEUTSCHER's fourth claim in his second federal habeas petition challenged the constitutionality of this aggravating circumstance and relied upon Godfrey. The State, in its motion to dismiss,

specifically claimed that this issue was barred by abuse of the writ pointing out that it had been raised on direct appeal but not in the first federal habeas petition. The district court order of November 20, 1986, asked for further briefing by the parties solely on the issue of procedural default of the numerous claims. DEUTSCHER's brief filed in December of 1986, pointed out that this specific issue was not barred by procedural default because it had been raised on direct appeal. The State's reply filed on January 12, 1987, acknowledged that procedural default did not bar this issue but again noted that the issue was barred by abuse of the writ. The district court order of April 1, 1987, discussed procedural default and any possible excuse by a showing of cause and prejudice only with respect to the claims raised in Counts 1 through 3 and 5

through 10. None of the remaining district court orders discussed abuse of the writ in any form, especially with regard to claim number 4.

In its cross-appeal to the Ninth Circuit, the State specifically claimed that the lower court failed to rule on the abuse-of-the writ defense asserted by the State. The circuit court obviously glossed-over this claim especially with regard to the torture, depravity of mind or mutilation aggravating circumstance. Even assuming the validity of the Ninth Circuit's legal requirements for finding abuse of the writ as discussed previously, it is obvious that counsel for the first federal habeas petition was aware of the claim against the aggravating circumstance and simply chose not to raise it. The Nevada Supreme Court had reached the issue on direct appeal. Deutscher v. State, 95 Nev. at 677, 601

P.2d at 412-13 (Appendix C). There was simply no excuse for the failure to raise the claim in the first federal habeas petition and DEUTSCHER at no time proved even that he did not consciously withhold this claim.

B. The Circuit Court's Ruling that the Depravity of Mind Circumstance was Vague is Contrary to the Decisions of this Court.

One of Nevada's circumstances by which murder of the first degree may be aggravated such that death may be imposed is that the murder "involved torture, depravity of mind or the mutilation of the victim." Nev. Rev. Stats. § 200.033 (8) (1988). At the end of the circuit court's opinion, the court concluded that, while the "torture and mutilation aspects of this circumstance are sufficiently clear and objective to satisfy the requirements of Godfrey," the "depravity of mind instruction . . . fails to

meet Godfrey requirements." Deutscher v. Whitley, ___ F.2d at ____, Slip Op. at 10511-12 (Appendix A).

On direct appeal, the Nevada Supreme Court noted that the trial court had "meticulously defined for the sentencing panel" the relevant terms of torture, depravity and mutilation. The specific instructions were cited in a footnote. Deutscher v. State, 95 Nev. at 677 & n.5, 601 P.2d at 413 & n.5 (Appendix C). The circuit court agreed, with regard to mutilation, stating that the "cutting off or destruction of a portion of the body (mutilation) is an objective difference between a murder by mutilation and any other murder." Deutscher v. Whitley, ___ F.2d at ____, Slip Op. at 10512. With regard to torture, the circuit court determined that "[i]ntent to cause cruel pain and suffering for sadistic purposes is a similarly objective and reviewable

distinction." Id. The circuit court could not agree that the depravity of mind instruction met Godfrey requirements. The court erroneously stated that there was nothing in the definition which restrained "arbitrary imposition of the death penalty. . . . The depravity instruction in this case, although it contains more words, is no more capable of channeling discretion than the 'especially heinous, atrocious, or cruel' instruction rejected in Maynard or the 'outrageously or wantonly vile, horrible or inhuman' instruction in Godfrey." Id. Nevertheless, the circuit court determined that because the jury found two aggravating circumstances in addition to the torture, depravity of mind or mutilation circumstance, the court would affirm had it not decided to reverse on the basis of ineffective counsel.

The State will be aggrieved by the

ruling on this aggravating circumstance even though the court stated it would affirm had another issue not been decided adversely to the State. The reason for this is that the State would be allowed to hold another penalty hearing to decide DEUTSCHER's sentence. Even though the ruling with regard to the depravity of mind aggravating circumstance appears to be dicta, courts may deny the State an opportunity to use this as an aggravating circumstance in DEUTSCHER's resentencing or in other capital cases.

In any event, the circuit court ruling was incorrect. The depravity of mind circumstance was defined for the jury as a

> condition of mind . . . characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageous-

ly, wantonly vile, horrible or inhuman.

See Deutscher v. State, 95 Nev. at 677 n.5, 601 P.2d at 413 n.5. This does not present a situation like that in Godfrey or Maynard. In Godfrey, the defendant was sentenced to death based only on the single aggravating circumstance that the offense of murder was outrageously or wantonly vile, horrible and inhuman. Godfrey v. Georgia, 446 U.S. at 426, 428. In past cases, the state supreme court had recognized the possible vagueness of this aggravating circumstance and had limited it to cases in which there had been torture, aggravated battery or depravity of mind. Id. at 429-32. In the Godfrey case, however, there was no finding by the state supreme court that such an aggravated battery or torture had occurred and, in fact, the victims were killed instantaneously. Id. at 432-33.

In Maynard, this Court found that the language of the Oklahoma aggravating circumstance gave no more guidance than the language of the Georgia aggravating circumstance in Godfrey. Similarly, the Oklahoma court failed to rectify the situation with a narrowing limitation. Maynard v. Cartwright, 108 S.Ct. at 1859. Thus, in both Godfrey and Maynard, this Court determined that the aggravating circumstances by themselves failed adequately to inform juries of what they must find to impose the death penalty in violation of the eighth amendment.

Unfortunately, the Ninth Circuit failed to analyze the important distinctions in Nevada law. Although the final sentence of the definitional instruction of depravity of mind used the same phrase found in Godfrey, the remainder of the definition was sufficiently definitive in and of itself. A jury was required to

find that the defendant had an intent "which is devoid of regard for human dignity and which is indifferent to human life" based upon the facts of the case. In this particular case, the facts were that the victim was found nude except for a blouse and bra which had been pulled apart and her "neck, face and head were severly bruised, bearing extensive abrasive-type injuries. Her head had a large depression skull fracture, two and three-fourth inches in diameter caused by a crushing or blunt type object." Deutscher v. State, 95 Nev. at 674, 601 P.2d at 410-11. There were bite marks on the victim made by DEUTSCHER's teeth. The victim had been strangled and all injuries were inflicted while the victim was still alive with the blow causing a hole to left side of her head being the last and lethal injury. The jury found that the offense had been committed in an

attempt to commit a sexual assault. Id. at 675-76, 601 P.2d at 411-412.

The same instructions given to the DEUTSCHER jury in 1977 have been given to all other juries in Nevada considering this aggravating circumstance since that time. The Nevada Supreme Court has upheld the aggravating circumstance of torture, depravity of mind or mutilation when supported by sufficient facts which usually demonstrate a lingering death and the defendant's "indifference to human life" and an intent "devoid of regard for human dignity."[8] The state supreme court decisions in the cited Rogers and

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[8] See, e.g., Flanagan v. State, 105 Nev. ____, ____ P.2d ____ (Adv.Op. 29, 1989) (repeated and varied attempts to kill over a period of time demonstrate depravity); Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987) (pregnant female victim stabbed numerous times and tortured before death); Cavanaugh v. State, 102 Nev. 478, 729 P.2d 481 (1986) (defendant cut out victim's vocal cords and shot him again after a shot to the face several

Neuschafer cases specifically distinguished this Court's opinion in Godfrey. Even the federal district court in this case upheld the depravity of mind aggravating circumstance distinguishing Godfrey by the fact that DEUTSCHER's jury was given further definition of the terms and based upon the facts of the case. Deutscher v. Whitley, 682 F.Supp. at 1106-07 (Appendix B).

The analysis by the Ninth Circuit

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hours before; defendant then amputated victim's hands and feet, attempted to cut off victim's head, used acid to remove victim's prints from fingers); Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985), cert. denied, 476 U.S. 1130 (1986) (victims shot and stabbed numerous times before death); Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985) (inmate victim strangled by defendant prison inmate, had neck snapped back and died next day due to shortage of oxygen to brain); Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984) (defendant doused teenage female sexual assault victim with combustible fluid and lit her on fire while she was in a sitting or standing position).

was woefully inadequate and the result was clearly contrary to the decisions of this Court. This Court should grant certiorari to review this conflict.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court grant certiorari and reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted.

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October 25, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Henry Deutscher,	)	
	)	
Petitioner/Appellant/	)	
Cross-Appellee,	)	Nos.88-2552;
	)	88-2579
v.	)	
	)	D.C. No.
Harol Whitley, Warden of	)	CV-N-86-445-
the Nevada State Prison,	)	ECR
and Brian McKay, Attorney	)	
General of the State of	)	OPINION
Nevada,	)	
	)	
Respondents/Appellees/	)	
Cross-Appellants.	)	
	)	

Appeal from the United States District Court for the District of Nevada
Edward C. Reed,
District Judge, Presiding

Argued and Submitted
January 10, 1989
San Francisco, California

Filed August 31, 1989

Before: Otto R. Skopil, Jr.,
Jerome Farris and
Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Farris

Criminal Sentencing/Criminal Procedure

Reversing and remanding the district court's denial of a writ of habeas corpus, the court held that failure of defense counsel to present mitigating evidence at a capital sentencing hearing is prejudicial when there is no reasonable probability that the jury's sentencing decision would have been the same had the jury heard the mitigating evidence.

Appellant Henry Deutscher was convicted of first degree murder and of robbery without the use of a weapon and sentenced to die. During both the guilt and the penalty phase, Deutscher was represented by Herbert Ahlswede. Ahlswede did not call any witnesses during the penalty phase nor did he investigate Deutscher's past psychiatric treatment or family background, which

would have revealed that Deutscher was born substantially premature, that he had been diagnosed as mentally ill, and that he had sought, but was not given, psychological care for violent outbursts. Dr. O'Gorman, a psychiatrist who examined Deutscher near the time of the murder testified during a state post-conviction hearing that Deutscher's history was consistent with a mental disorder characterized by episodes of uncontrollable violence. Deutscher appealed, and present counsel was substituted for Ahlswede. Deutscher through present counsel litigated additional claims in state court which denied relief, and this denial was affirmed by the Nevada Supreme Court. The court held that Deutscher was not deprived of effective assistance of counsel and that his other assignments of error were barred by procedural default. Deutscher again petitioned for habeas

corpus, setting forth ten claims.

[1] The court affirmed that Count Two, no finding of intent; [2] Count Three, improper argument; [3] Count Five, double counting of concurrent felony; [4] Count Six, sentencing standard; [5] Count Seven, discrimination; [6] Count Eight, exclusion of prospective jurors; [7] Count Nine, improper proportionality review; and [8] Count Ten, prejudicial evidence introduced at sentencing, were all barred by procedural default. [9] Deutscher argued that he was deprived of the effective assistance of counsel in violation of the Sixth Amendment. [10] Deutscher must show that his counsel's performance was deficient and that this deficient performance prejudiced his defense. [11] Counsel did not even consider presenting evidence of Deutscher's mental problems or any other mitigating evidence at the penalty

hearing. Counsel himself admitted at the state trial court hearing on this issue that this aspect of Deutscher's representation was deficient. [12] Counsel did not make a reasoned decision not to use psychiatric testimony, nor did he rely on a simple plea for mercy. Counsel did not even know what evidence was available. [13] Counsel had a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. He did neither. [14] To show that prejudice resulted from his counsel's defective performance, Deutscher must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. [15] Although prejudice cannot be presumed, a finding that Deutscher was not prejudiced by his state-appointed lawyer's failure to

present any mitigating evidence at all would deny Deutscher the chance to ever have a jury, Nevada's final arbiter, fully consider mitigating evidence in his favor. [16] The case was remanded for entry of an order granting the writ of habeas corpus, unless the state resentences Deutscher within a reasonable time.

COUNSEL

David J. Burman and Stephan R. Illa, Perkins Coie, Seattle, Washington, and Thomas E. Perkins, Carson City, Nevada, for the petitioner/appellant/cross-appellee.

Brian McKay, Attorney General, and David F. Sarnowski, Supervising Deputy Attorney General, Carson City, Nevada, for the respondents/appellees/cross-appellants.

OPINION

FARRIS, Circuit Judge:

Henry Deutscher appeals the district

court's dismissal of his petition for writ of habeas corpus. Deutscher sought habeas corpus relief from a Nevada court's sentence of death. Nevada authorities appeal the district court's refusal to hold a hearing on whether Deutscher's petition was an abuse of the writ of habeas corpus. We reverse the district court's dismissal of Deutscher's petition and remand with instructions to grant the writ unless Deutscher is resentenced within a reasonable time.

FACTS

In 1977, a Nevada jury convicted Deutscher of first degree murder and of robbery without the use of a weapon. After a separate hearing, the same jury sentenced Deutscher to die. Witnesses at trial testified that the victim had been strangled, beaten, and bitten, prior to suffering a fatal skull fracture.

Two potential jurors were excluded

from Deutscher's jury because of their views on the death penalty. Both jurors said they would not impose the death penalty under any circumstances.

During the penalty phase of the trial, the court instructed the jury to impose the death penalty unless the mitigating circumstances outweighed the aggravating circumstances. The court instructed the jury as to three possible aggravating factors: (1) prior conviction of a felony involving the use or threat of violence; (2) murder during an attempted sexual assault; and (3) murder involving "torture, depravity of mind, or the mutilation of the victim." The jury found all three of these aggravating factors.

During both the guilt phase and the penalty phase, Deutscher was represented by Herbert Ahlswede. Ahlswede did not call any witnesses at the penalty phase

hearing. Although Ahlswede made a tactical decision not to pursue an insanity defense during the guilt phase, he did not consider using psychological evidence during the penalty phase. Nor did Ahlswede investigate Deutscher's past psychiatric treatment or family background. Investigation would have revealed that Deutscher was born substantially premature, that he had been diagnosed as mentally ill and treated for mental illness, and that he had sought, but was not given, psychiatric care for uncontrollable violent outbursts. Dr. O'Gorman, a psychiatrist who examined Deutscher near the time of the murder, testified during a state post-conviction hearing that Deutscher's history was consistent with a mental disorder characterized by episodes of uncontrollable violence.

Ahlswede did present a closing

argument at the penalty phase hearing but referred to only one mitigating factor: that Deutscher killed while under the influence of an extreme mental disturbance. Ahlswede argued that such a brutal murder could only have been the product of a diseased mind.

The Nevada Supreme Court affirmed Deutscher's conviction and sentence. Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979). Ahlswede filed a habeas corpus petition on Deutscher's behalf in the United States District Court for the District of Nevada. The court directed Deutscher to submit four unexhausted issues to the state courts. Following exhaustion of those issues, the district court dismissed the petition.

Deutscher appealed to this court, and present counsel was substituted for Ahlswede. Present counsel determined that a number of federal issues were not

presented by Ahlswede during post-conviction proceedings and asked us to remand the case to state court to allow the new issues to be raised. We denied remand and affirmed dismissal of the petition. Ahlswede v. Wolff, 720 F.2d 1108 (9th Cir. 1983), cert. denied, 469 U.S. 873 (1984).

Deutscher, through present counsel, then litigated his additional claims in state court. The state trial court denied relief, and the Nevada Supreme Court affirmed. Deutscher v. Warden, Nevada State Prison, 102 Nev. 388, 724 P.2d 213 (1986). The Nevada court held on the merits that Deutscher was not deprived of effective assistance of counsel. Id. at 214. The court held that Deutscher's other assignments of error were barred by procedural default. The court held that Deutscher could not show good cause of failing to raise his

claims within one year of the resolution of his direct appeal and failing to raise his claims in his first petition for post-conviction relief. Id. (citing Nev. Rev. Stat. §§ 177.315(3) and 177.375(2)).

Deutscher again petitioned for habeas corpus. The petition set forth the following claims:

> 1. Deutscher was deprived of effective assistance of counsel.
>
> 2. Deutscher was sentenced to death without a finding of intent to commit murder.
>
> 3. The prosecutor's argument was improper.
>
> 4. Deutscher was sentenced to death based on the "torture, depravity of mind, or mutilation" aggravating circumstance.
>
> 5. The state used a concurrent felony both to support a felony murder conviction and as an aggravating circumstance.
>
> 6. The trial court failed to instruct the jury that the prosecution must prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating

circumstances.

7. Nevada improperly discriminates in imposing the death penalty.

8. Prospective jurors were improperly excluded.

9. The Nevada Supreme Court violated due process by failing to conduct a proper proportionality review.

10. Prejudicial evidence of prior bad acts was improperly admitted.

The United States District Court held that Deutscher was barred by unexcused procedural default from raising counts two, three, five, six, seven, nine, and ten. Deutscher v. Whitley, 663 F.Supp. 793, 800-01 (D.Nev.) reconsid. denied, 671 F. Supp. 1264, 1267 (D. Nev. 1987). The court rejected counts one, four, and eight on the merits. Deutscher v. Whitley, 682 F.Supp. 1098 (D.Nev. 1988).

I. STANDARD OF REVIEW

We review de novo a district court's

grant or denial of habeas corpus relief. McKenzie v. Risley, 842 F.2d 1525, 1531 (9th Cir.) (en banc), cert. denied, 109 S.Ct. 250 (1988). We review for abuse of discretion the district court's decision not to dismiss the petition as an abuse of the writ. See Harris v. Pulley, 852 F.2d 1546, 1561 (9th Cir. 1988). A state trial court's determination of juror bias is presumed correct under 28 U.S.C. § 2254(d). Wainwright v. Witt, 469 U.S. 412, 424 (1985). All other issues presented by this appeal are issues of law or mixed legal-factual issues. We review these issues de novo. See United States v. McConney, 728 F.2d 1195, 1200-1205 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984).

II. ABUSE OF THE WRIT

The state contends that the district court erred by failing to require Deutscher to prove in an evidentiary hearing

that he had not abused the writ by bringing a successive habeas corpus petition. 28 U.S.C. § 2254, Rule 9(b) provides that:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted abuse of the writ.

In Harris v. Pulley, we set forth a three-part test for determing whether a successive petition is an abuse of the writ under rule 9(b):

> Previously unadjudicated claims must be decided on the merits unless (1) the petitioner has made a conscious decision deliberately to withhold them, (2) is pursuing "needless piecemeal litigation," or (3) has raised the claims only to "vex, harass, or delay."

852 F.2d at 1572 (quoting Richmond v.

Ricketts, 774 F.2d 957, 961 (9th Cir. 1985)). In Harris, previous counsel failed to make a claim, not for any tactical reason but "merely because he missed it." 852 F.2d at 1572. We held that because counsel had not made a conscious decision to withhold claims, engage in piecemeal litigation, vex, harass, or delay, the successive petition was not an abuse of the writ. Deutscher's previous counsel similarly made no conscious decision to withhold claims. The claims simply did not occur to counsel. The district court correctly held that Deutscher's petition was not an abuse of the writ.

III. PROCEDURAL DEFAULT

The district court held that counts two, three, five, six, seven, nine, and ten were barred by procedural default. Deutscher claims this holding was error. The state argues that all of Deutscher's

claims should have been rejected because of Deutscher's procedural default in failing to raise the claims in the first state post-conviction proceeding, see Nev. Rev. Stat. 177.315(3), and in failing to file his petition for state post-conviction relief within one year of final resolution of his direct appeal. See Nev. Rev. Stat. 177.375(2).

A state prisoner barred by procedural default from litigating a claim in state court may not litigate that claim in a habeas corpus proceeding unless he can show cause for and actual prejudice from the default. Engle v. Isaac, 456 U.S. 107, 110 (1982) (citing Wainwright v. Sykes, 433 U.S. 72 (1977)).

Whether there is cause for procedural default will "ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with

the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). Deutscher attempts to demonstrate cause for his procedural default by showing either that his counsel's failure to raise each claim deprived him of effective assistance of counsel or that the claims were unavailable at the time they should have been raised. Either showing is sufficient to establish cause. Id.

Ineffective assistance of counsel is sufficient cause to excuse procedural default. "[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." Id. An ineffective assistance of counsel claim has two components.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel

> was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687 (1984). Because actual prejudice is an aspect of ineffective assistance of counsel, a defendant who proves ineffective assistance need not make any additional showing of prejudice to overcome procedural default.

Cause also exists when the claim is novel in that it had "no reasonable basis in existing law" at the time of the procedural default. Reed v. Ross, 468 U.S. 1, 15 (1984). But "the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 477 U.S. 527, 537 (1986). To overcome procedural default, a defendant

who demonstrates that his claim was unavailable at the time it should have been raised must also show that he was prejudiced by his counsel's failure to raise the claim. See Engle v. Isaac, 456 U.S. at 110.

A. Count One: Ineffective Assistance

This claim is not subject to procedural default because the Nevada Supreme Court reached the merits. See Wainwright v. Sykes, 433 U.S. at 87; Deutscher v. Warden, Nevada State Prison, 724 P.2d at 214 (reaching the merits of Deutscher's ineffective assistance claim).

B. Count Two: No Finding of Intent

[1] The court instructed the jury that, under Nevada's felony murder statute, it could convict without finding that Deutscher intended to kill the

victim. Deutscher contends that unintentional murder is an insufficient offense to justify imposition of the death penalty.

Deutscher's reasons for failing to raise this claim are not sufficient cause for procedural default. Deutscher's counsel was unaware of this claim. The mere fact that counsel failed to recognize the factual or legal basis of a claim, however, is not cause for default. Murry v. Carrier, 477 U.S. at 486-87. Although Coker v. Georgia, 433 U.S. 584 (1977), held, prior to resolution of Deutscher's appeal, that the death penalty is a disproportional penalty for rape, it was not until Enmund v. Florida, 458 U.S. 782 (1982), that the Supreme Court questioned imposition of the death penalty in felony murder cases. Given the state of the law at the time, counsel's failure to raise the claim was not

outside the "wide range of reasonable professional assistance." See Strickland, 466 U.S. at 689. Counsel's failure also may not have been prejudicial. See Tison v. Arizona, 481 U.S. 137 (1987) (holding that the death penalty could be constitutionally imposed against a defendant who neither intended to kill nor actually killed but who was recklessly indifferent to human life).

Novelty of this claim is also insufficient cause for procedural default. The claim that a sentence was disproportional to the crime was available when Deutscher appealed. See Weems v. United States, 217 U.S. 349, 371 (1910); Coker, 433 U.S. at 596.

C. Count Three: Improper Argument

[2] Deutscher claims that the prosecution misstated the law and prevented the jury from considering mitigating evidence by saying "what you

voluntarily take into your system isn't any defense."

Although Deutscher's counsel was unaware of the claim, this unawareness was not egregious enough to be ineffective assistance. Nor did prejudice result from failure to raise the claim. A prosecutor's argument does not violate the Constitution unless it renders the defendant's trial "so fundamentally unfair as to deny him due process." Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974). A misstatement of the law can deny due process, but reversal is not warranted unless the misstatement prejudiced the hearing. United States v. Becker, 720 F.2d 1033, 1036 (9th Cir. 1983). See also Campbell v. Kincheloe, 829 F.2d 1453, 1457 (9th cir. 1987), cert. denied, 109 S.Ct. 380 (1988).

Deutscher's contention that this claim of improper argument was

unavailable in 1977 also lacks merit. See, e.g., DeChristoforo, 416 U.S. 637; U.S. v. Martinez, 514 F.2d 334, 343 (9th Cir. 1975).

D. Count Four: Torture, Depravity of Mind, or Mutilation

Procedural default does not apply to this claim because the claim was properly raised in state court.

E. Count Five: Double Counting of Concurrent Felony

[3] Deutscher contends that the trial court erred in allowing the jury to use a concurrent felony both to convict him of felony murder and as an aggravating circumstance for imposition of the death penalty.

Failure to raise this issue was not prejudicial. See Lowenfield v. Phelps, 484 U.S. 231 (1988) (holding that use of the same circumstance as both a guilt phase element and an aggravating

circumstance is constitutional as long as the class of death eligible persons is genuinely narrowed).

F. Count Six: Sentencing Standard

[4] Deutscher contends that the court erroneously instructed the jury to impose the death sentence unless mitigating factors outweighed aggravating circumstances.

As with other claims, Deutscher admits this was a developing issue at the time of his direct appeal. Because of this, Deutscher's counsel was not ineffective for failing to raise the claim. That the issue was "developing" also indicates that the claim was available.

G. Count Seven: Discrimination

[5] Deutscher contends that the death penalty was improperly imposed against him because the penalty is discriminatorily imposed against poor persons, males, and those convicted of

killing white women. Deutscher was not prejudiced by his counsel's failure to raise this claim. See McClesky v. Kemp, 481 U.S. 279, 292 (1987) (holding that statistical bias in imposition of the death penalty does not mandate reversal of individual death sentences).

H. Count Eight: Exclusion of Prospective Jurors

[6] Deutscher contends that jurors were improperly excluded from his jury despite their willingness to impose the death penalty in the proper circumstances. Deutscher was not prejudiced by his counsel's failure to raise this claim. If the claim had been brought, a reviewing court would have affirmed.

A juror may be excluded when the juror's scruples against the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions

and his oath." Gray v. Mississippi, 481 U.S. 648, 658 (1987) (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985)). Juror bias is a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Wainwright v. Witt, 469 U.S. at 428-29. Thus, the question before a reviewing court is not whether the court agrees with the trial court's findings, but whether those findings are fairly supported by the record. Id. at 434 (citing Marshall v. Lonberger, 459 U.S. 422, 432 (1983)).

The trial court's finding that jurors Gossard and Norris were properly excluded is supported by the record. Both jurors said during voir dire that they could not impose the death penalty under any circumstances.

Q. (Mr. Ahlswede)

So you are saying that you could never under any circumstances at any time impose a

death penalty on an individual, no matter how awful the crime was?

A. (Juror Gossard)

I never been able to since a few things happened in my life. I just--I just couldn't do it.

* * *

Q. (Mr. Ahlswede)

Do you feel that you could never under any circumstances send anyone to the gas chamber?

A. (Juror Norris)

No, I could never.

The district court incorrectly found that Deutscher's counsel rendered ineffective assistance by failing to assert improper exclusion of jurors on appeal. Because Deutscher was not prejudiced by his counsel's failure to raise this claim, Deutscher's claim on this issue is barred by procedural default.

I. Count Nine: Improper Proportionality Review

[7] Deutscher contends the Nevada

Supreme Court failed to properly conduct the proportionality review required by Nevada's death penalty statute and thus deprived Deutscher of a liberty interest without due process. Deutscher was not prejudiced by his procedural default. See Pulley v. Harris, 465 U.S. 37, 50-51 (1984) (holding that the Constitution does not require proportionality review).

J. Count Ten: Prejudicial Evidence Introduced at Sentencing

[8] Deutscher argues that the trial court violated due process during the penalty phase hearing by allowing the state to prove a prior sexual assault conviction by testimony of the victim and arresting officer. This claim was available to counsel. No case decided since Deutscher's appeal has significantly changed the type of evidence that can be presented during the penalty phase. Proving that introduction of

evidence violated due process is extraordinarily difficult. See Hobbs v. Lockhart, 791 F.2d 125, 128 (8th Cir. 1986) (holding that to violate due process, evidence must be so conspicuously prejudicial or of such magnitude that it fatally infected the trial and deprived the defendant of fundamental fairness). Given the small likelihood of success, counsel's decision not to raise the claim was within the broad parameters of reasonably effective assistance.

IV. INEFFECTIVE ASSISTANCE

[9] Deutscher argues that he was deprived of the effective assistance of counsel in violation of the Sixth Amendment. Deutscher's ineffective assistance claims fall into two categories: first, Deutscher claims that counsel failed to investigate and present mitigating evidence at the penalty phase hearing; second, Deutscher claims that counsel

failed to present meritorious claims on appeal. Because Deutscher also claims that ineffective assistance on appeal was cause for his procedural defaults, Deutscher's claims of ineffective assistance on appeal are addressed in the preceding section.

[10] Deutscher claims that his counsel's failure to investigate and present mitigating evidence at the penalty phase was ineffective assistance. We evaluate Deutscher's claim under the two-part Strickland test. First, Deutscher must show that his counsel's performance was deficient. Second, Deutscher must show that his counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687.

In evaluating Deutscher's counsel's performance, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). We do not look at counsel's performance through the distorting lenses of hindsight, but rather examine counsel's performance according to what was reasonable at the time. Id.

[11] We agree with the district court that Deutscher's counsel's performance was defective. Counsel's sole mitigation argument was that Deutscher must have had some sort of mental problem. Yet counsel did not even consider presenting evidence of Deutscher's mental problems or any other mitigating evidence at the penalty phase hearing. Counsel himself admitted at the state trial court hearing on this issue that this aspect of

Deutscher's representation was deficient. Counsel made no tactical decision not to investigate Deutscher's possible mental impairment. He simply failed to do so.

[12] We do not hold that failure to present mitigating evidence at a capital sentencing hearing is always defective performance. In certain cases, counsel might reasonably decide that mitigation evidence would present more problems than it would solve. In Darden v. Wainwright, 477 U.S. 168 (1986), the Court rejected a claim of ineffective assistance where counsel failed to present evidence in mitigation at a capital sentencing hearing. The Court noted:

> [T]here are several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself. Any attempt to portray petitioner as a nonviolent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions. . . . For that reason, after consultation

> with petitioner, defense counsel rejected use of psychiatric testimony.

Id. at 186. Counsel in this case did not make a reasoned decision not to use psychiatric testimony. Nor did he decide to rely on a simple plea for mercy. Rather, counsel decided to defend on the basis of petitioner's psychiatric problems, but did not even consider investigating evidence which would have bolstered that defense. Counsel could not have chosen to avoid psychiatric evidence because of potentially damaging rebuttal testimony. Counsel did not even know what evidence was available.

[13] Ahlswede had a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. He did neither. In Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988), we considered a similar case.

Counsel knew his client had some history of mental problems, but "conducted no investigation to ascertain the extent of any possible mental impairment," id. at 636, and did not present any mitigating evidence at his client's death penalty hearing. "Under these circumstances, counsel's failure to pursue the possibility of establishing . . . mental instability constituted deficient performance." Id. at 637. This case is virtually identical. Counsel knew from the report of Dr. O'Gorman that Deutscher had been hospitalized for mental problems in the past, but counsel completely failed to pursue the possibility of presenting mitigating evidence of mental impairment. Deutscher's counsel's performance was deficient.

[14] The district court rejected Deutscher's ineffective assistance claim, however, holding that Deutscher had not

shown prejudice as required by the second part of the Strickland test. To show that prejudice resulted from his counsel's defective performance, Deutscher must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. We cannot say with confidence that the jury's sentencing decision would have been the same in this case had Deutscher's counsel presented the available mitigating evidence.

The penalty phase hearing Deutscher received consisted of extensive testimony about an incident in 1967 in which Deutscher sexually assaulted a young woman. This testimony included the woman's own emotional and graphic

description of the attack. This was followed by an extremely persuasive closing argument in which the prosecutor detailed five aggravating circumstances and then demonstrated the complete absence of any of seven mitigating circumstances. Next, Deutscher's counsel admitted there was "no excuse" for what Deutscher had done, admitted the presence of the aggravating circumstances detailed by the prosecutor, and argued in mitigation only that "such a sick mind is not to be punished by rather to be pitied." Finally, the prosecutor accurately pointed out the complete lack of any evidence of mitigation--"as far as insanity, the first thing you hear about it is an argument here on penalty. Don't you believe if he had a doctor that would say he was insane, which he is entitled to, that you would have had him on the stand here?"

Having that doctor on the stand might have made a difference. Dr. O'Gorman, a competent, experienced psychiatrist who examined Deutscher in 1977, would have testified that premature children such as Deutscher can develop a mental disorder characterized by episodes of uncontrollable violence that are often accompanied by a temporary loss of memory. He would have testified that stress and alcohol can make such an outburst more likely and that Deutscher's story that he had blacked out was consistent with the symptoms of this disorder. Mental health records would have shown diagnoses of schizophrenia, pathological intoxication, and organic brain damage; commitments to mental institutions; and a history of good behavior in institutional settings. The records would have also shown that Deutscher had asked for but had not received treatment for episodes

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of uncontrollable violence. Deutscher's family would have testified that Deutscher suffered fetal injury and was born prematurely due to a beating his mother received from his father, that Deutscher's father beat and occasionally seriously injured Deutscher, and that Deutscher was often beaten while attempting to protect his mother and sisters from his father.

In finding that counsel's deficiencies were not prejudicial, the district court pointed to testimony by Dr. Master disputing Dr. O'Gorman's conclusions and the previous diagnoses. Dr. Master testified that Deutscher was not mentally ill, but rather had no social conscience. The court speculated that the jury might have considered this lack of social conscience testimony as further aggravation. Dr. Master's testimony might have been successfully

rebutted. Dr. Master did not take into account Deutscher's premature birth, fetal injury, or childhood beatings. Dr. Master admitted that Deutscher would do well in an institutional setting. In addition, Dr. Master might have been impeached by evidence that Dr. Master has been an overzealous prosecution witness in other murder trials. Moreover, much of Dr. Master's testimony would have been inadmissible at the penalty phase hearing. Dr. Master was appointed by the trial court to determine Deutscher's competence to stand trial. When "a psychiatrist designated by the trial court to conduct a neutral competency examination" goes beyond simply reporting on competence and testifies at the penalty phase, he becomes like "an agent of the State recounting unwarned statements made in a post-arrest custodial setting," and use of his testimony could

violate the Fifth Amendment. Estelle v. Smith, 451 U.S. 454, 467 (1981).

[15] Although we do not presume prejudice in a case such as this, we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing. The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy. California v. Brown, 479 U.S. 538, 554 (1987). "Consideration of such evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death'" Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality)). The Supreme Court has consistently held that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1 (1986)

(quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982)). See also, Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987). Deutscher's state appointed lawyer failed to present any mitigation evidence at all. A finding that Deutscher was not prejudiced by this failure would deny Deutscher the chance to ever have a jury, Nevada's death penalty arbiter, fully consider mitigating evidence in his favor. Instead, second hand bits and pieces of mitigation evidence would be analyzed and rebutted based only on speculation about what might have happened if dozens of important variables had been different. Allowing the death penalty to be imposed in that context would fall far short of the constitutional mark. We therefore reverse and remand for resentencing so that a jury can pro- perly weigh mitigating and aggravating circumstances before deciding Deutscher's fate.

In our efforts to protect the constitutional right to "effective assistance of counsel" recognized in McMann v. Richardson, 397 U.S 759, 771 n.14 (1970), we have often treated "ineffective assistance of counsel" as if it were a defense available to one accused of a crime. It is not a defense. Rather, it is an indictment of counsel that results in relief to one who is unfortunate enough to have been represented incompetently. Because of our treatment of the issue, defense lawyers may be encouraged to leave behind a trail of mistakes in a hopeless case so that there is some possibility of relief on ineffective assistance grounds in a case in which no relief is legally available to the accused. We cannot and do not accuse counsel of such reprehensible conduct. We must therefore conclude that the incompetent act is performed because

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the lawyer is not competent to represent those accused of crime. Courts should not tolerate incompetence so flagrant as to be ineffective assistance. Nor should courts tolerate deliberate mistakes which amount to both a dereliction of duty and an egregious lack of candor toward the courts. In the case of deliberate mistakes, it may become necessary for this court to act to prevent and deter such conduct. It is within our supervisory powers, for example, to revoke the privilege of practice before this court when an attorney is found "guilty of conduct unbecoming a member of the bar of the court . . . ." Fed. R. App. P. 46(b). In appropriate cases, we will not hesitate to do so.

V. NEVADA'S TORTURE, DEPRAVITY, MUTILATION AGGRAVATING CIRCUMSTANCE

Deutscher argues that the aggravating circumstance of torture, depravity of

mind, or mutilation of the victim was unconstitutionally vague as applied to him. Nevada must not allow arbitrary and capricious imposition of the death penalty. See Godfrey v. Georgia, 446 U.S. 420, 427 (1980). The Supreme Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988). Because the jury was instructed that it could find this aggravating circumstance if torture, depravity of mind, or mutilation occurred, each of the three elements must be evaluated.[1] The torture and mutilation aspects of this circumstance are sufficiently clear and objective to satisfy the requirements of Godfrey. The cutting

off or destruction of a portion of the body (mutilation) is an objective difference between a murder by mutilation and any other murder. See Godfrey, 446 U.S. at 428. Intent to cause cruel pain and suffering for sadistic purposes is a similarly objective and reviewable distinction.

The depravity of mind instruction, however, fails to meet Godfrey requirements. There is nothing in the definition of depravity of mind that restrains arbitrary imposition of the death penalty. See Godfrey, 446 U.S. at 428. The depravity instruction in this case, although it contains more words, is no more capable of channeling discretion than the "especially heinous, atrocious, or cruel" instruction rejected in Maynard or the "outrageously or wantonly vile, horrible or inhuman" instruction in Godfrey. See also Adamson v. Ricketts,

865 F.2d 1011, 1029 (9th Cir. 1988) (en banc) (holding Arizona "especially cruel, heinous, and depraved" aggravating circumstance unconstitutional as applied).

Because the jury found two aggravating circumstances besides the torture, depravity of mind, or mutilation circumstance, however, Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir. 1987) (citing Zant v. Stevens, 462 U.S. 862 (1983)), would require affirmance as to this issue had we not decided to reverse on the basis of Deutscher's ineffective assistance claim.

CONCLUSION

[16] The case is remanded to the district court for entry of an order granting the writ of habeas corpus, unless the state resentences Deutscher within a reasonable time. All of Deutscher's claims except counts one and four

are barred by procedural default. The district court erred only in its determination that Deutscher was not prejudiced by his counsel's deficient performance in failing to investigate or present any mitigating evidence. Because Deutscher was denied his right to effective assistance of counsel at sentencing, his 1977 sentence must not be carried out.

REVERSED and REMANDED.

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[1]The relevant instructions were:

Instruction No. 21: the essential elements of murder by means of torture are: (1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion, or for any other sadistic purpose.

The crime of murder by torture does not necessarily require any proof that the defendant intended to kill the deceased, nor does it necessarily require

any proof that the deceased suffered pain.

Instruction No. 22: the condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

Instruction No. 23: You are instructed that the term "mutilate" means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Henry DEUTSCHER, Petitioner, v. Harol WHITLEY, Warden of the Nevada State Prison; and Brian McKay, Attorney General of the State of Nevada, Respondents.	No. CV-N-86-445-ECR

March 23, 1988

ORDER

EDWARD C. REED, Jr., Chief Judge.

The Court, by its order of December 17, 1987, ordered that an evidentiary hearing be held with respect to the ineffective assistance of counsel claims in count one of this petition. The hearing was held on January 6, 1988, at which time the Court received evidence and argument relating to Public Defender

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Ahlswede's representation of the petitioner at the murder trial in 1977. In order to set these issues in their proper temporal framework, it is necessary to review the complete history of this case.

The petitioner was convicted of murder and sentenced to death in Clark County, Nevada, in November 1977. His attorney at that time was Public Defender Ahlswede. Ahlswede appealed the petitioner's conviction directly to the Nevada Supreme Court, but that court affirmed the conviction in October, 1979. Ahlswede then petitioned the United States District Court on behalf of his client for a federal writ of habeas corpus in January, 1980, but that petition was dismissed, apparently for failure to exhaust all state remedies.

The petitioner then retuned to the state system to exhaust. A post-conviction petition was filed in June,

1980, and dismissed shortly thereafter. The state supreme court affirmed this dismissal in July, 1981. The petitioner then sought a federal writ of habeas corpus in August, 1982. Judge Foley reached the merits of that petition, and found that there was no basis for relief contained therein. Petitioner appealed this decision to the Ninth Circuit. At this time, Mr. Ahlswede ceased to represent the petitioner, and current counsel substituted in. Counsel immediately attempted to amend the petition before the Ninth Circuit to include all the claims in the present petition. This request was denied, ostensibly because these added claims were unexhausted in the state system. The Ninth Circuit affirmed Judge Foley's order of dismissal.

The petitioner and his counsel then returned to the state system again. In

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May, 1983, they filed a new post-conviction petition, which contained, among other things, claims that Ahlswede's representation of the petitioner at the trial level had fallen below the standards of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This petition was amended in May, 1985, and ultimately denied in November of that year. The state supreme court upheld that order in September, 1986.

The petitioner then set his sights on the federal system once again, and filed a second petition for the writ of habeas corpus in September, 1986. The state argued strenuously that the claims presented in that second petition were barred by the doctrine of procedural default, as they had not been presented properly to the state courts. The state courts had indeed refused to consider the

merits of the claims for that failure. Because the procedural default argument seemed to have merit, the Court held an evidentiary hearing on the issue of procedural default and the existence of cause and prejudice on May 11, 1987. The main thrust of the petitioner's argument was that his counsel, Mr. Ahlswede, was ineffective in his failure to raise the claims, and that cause and prejudice had therefore been established. (It is important to note that ineffective assistance of counsel was debated at the first evidentiary hearing purely as a means of establishing cause and prejudice, and not as a substantive habeas corpus count.)

As a result of that evidentiary hearing, the Court issued an order on June 25, 1987, in which it found that the petitioner had not established cause and prejudice, as he had not shown that his

attorney had been defective in failing to raise the issues presented in counts 2, 3, 5, 6, 7, 9, and 10 of the current petition. These claims were found subject to the procedural default rule, and were dismissed from the petition. The Court did find that former counsel had rendered insufficient assistance for Strickland purposes on count 8. This claim was allowed to remain in the petition. Counts 1 and 4 were never the potential subject of the procedural default, as they had been raised properly in the state courts. Of the original counts in the petition, therefore, only counts 1, 4, and 8 remain.

COUNT ONE/INEFFECTIVE ASSISTANCE OF COUNSEL

This count contains eleven separate claims for relief, all of which must be addressed separately. The petitioner contends that his attorney's assistance

fell below the reasonableness standard in Strickland, as he (1) failed to challenge the constitutionality of the torture/ depravity of mind instruction (count 1(d) of the petition); (2) failed to challenge the penalty phase burden of proof instruction (count 1(e)); (3) failed to challenge the lack of scienter in finding the petitioner eligible for the death penalty (count 1(f)); (4) failed to object to the introduction of hearsay and character evidence at the penalty phase (count 1(g)); (5) failed to object to prosecutor's misstatements with respect to mitigating circumstances (count 1(h)); (6) failed to object to the "doubling up" of aggravating circumstances (count 1(i)); (7) failed to present a penalty phase defense (count 1(j)); (8) failed to introduce evidence of insanity at the guilt phase, where psychiatric testimony would have indicated the petitioner's

mental illness (count 1(k)); (9) failed to call the petitioner at the guilt phase (count 1(l)); (10) failed to investigate the petitioner's past psychiatric history (count 1(m)); and (11) conceded the petitioner's guilt at the penalty phase and argued that the aggravating circumstances presented were not subject to dispute (count 1(n)).

COUNTS 1(e), 1(f), 1(g), 1(h), and 1(i)

The Court notes, however, that it has already decided that Mr. Ahlswede's representation did not fall below the Strickland standard with respect to counts 1(e), 1(f), 1(g), 1(h), and 1(i) listed above. These five counts were also named as independent substantive bases for relief in the petition. Thus, for example, while count 1(d) alleges that counsel was ineffective for failing to challenge the burden of proof at the penalty phase, count six alleges that the

burden of proof instruction used by the count was unconstitutional. Yet count six was subject to procedural default, and the petitioner attempted to defend against this rule by showing that counsel was ineffective for failing to raise that claim. The Court decided, as described above, that there was no ineffective assistance of counsel in failing to raise count six. Inasmuch as the standard for establishing attorney ineffectiveness for cause and prejudice is also the Strickland test, the Court has already decided the ineffectiveness issue in count 1(e). See Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 2646, 91 L.Ed.2d 397 (1986). Ineffective assistance of counsel count 1(f) similarly corresponds with count 2, count 1(g) with count 10, count 1(h) with count 3 and count 1(i) with count 5. As these issues have been decided by the Court's previous

order, that order is law of the case with respect to them, and the issues may not be relitigated here.

COUNT 1(d)

This ineffective assistance of counsel count is similarly related to count 4 of the petition, Count four, however, was not the subject of a procedural default count, and the Court has therefore not made any rulings with respect to counsel's performance. Because this count is so strongly tied with count 4, it does seem logical to delay decision until consideration of count 4, as the prejudice plank of the Strickland test requires the same inquiry as well count 4.

COUNT 1(j)

In this count, the petitioner argues that Ahlswede's representation fell below the Strickland standards when he failed to put on any penalty phase defense.

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Review of the record indicates that Ahlswede did not call any witness or introduce any independent evidence at the penalty phase. He did, however, cross-examine all prosecution witnesses, and did make a closing argument to the jury. Thus, to state that he failed to put on any penalty phase defense whatsoever is not entirely correct. The question, more aptly put, is whether he failed in his duties under Strickland by not introducing any evidence of his own.

This issue is easily laid to rest. As the Eighth Circuit has recently noted

> [T]he fact that mitigating evidence is not set forth does not inexorably lead to a conclusion of ineffective counsel. One must look further as to why the mitigating evidence was not produced. If counsel has through neglect failed to discover such evidence, then counsel will be found ineffective. If, however, the mitigating evidence is not produced because counsel, after reasonable investigation and exercise of

> professional judgment, has determined that withholding of such evidence is the more strategically sound course, then there has been no ineffectiveness.

Laws v. Armontrout, 834 F.2d 1401, 1410 (8th Cir.1987); see also Campbell v. Kincheloe, 829 F.2d 1453, 1462 (9th Cir. 1987). That the petitioner's attorney did not introduce any evidence at the penalty phase in this case is not of itself a basis for habeas relief. The relevant inquiry focuses upon the reasons that attorney had in not producing any such evidence. Counts 1(k) and 1(m) allege that Ahlswede ignored evidence vital to the effective penalty phase defense of his client without substantial reason for doing so. County 1(j) will therefore be considered in conjunction with those two counts.

COUNTS 1(k) and 1(m)

In these two counts, the petitioner contends that Ahlswede's representation was constitutionally flawed in that he failed to introduce evidence of insanity at the guilt phase, where psychiatric evidence existed that tended to prove that the petitioner suffered from a mental illness. Similarly, the petitioner argues that Ahlswede failed to investigate the petitioner's psychiatric background, including his family, former teachers, his 1967 sexual assault conviction, and his previous psychiatric records. By failing to investigate the petitioner's past, and by failing to introduce evidence of mental illness, the petitioner contends that his former attorney deprived him of his key defense at the penalty phase--insanity.

It appears to the Court that counts 1(k) and 1(m) really state both planks of the Strickland test. In count 1(m),

petitioner argues that his attorney exercised unreasonable professional judgment in failing to investigate his psychiatric background sufficiently. In count 1(k), petitioner then argues that he was prejudiced by counsel's failure to introduce that evidence at the penalty phase. The Court will consider the counts in that fashion.

[1] Whether counsel's failure to investigate adequately the petitioner's background in search of mitigating evidence amounts to ineffective assistance of counsel depends on whether counsel made a decision, supported by reasonable professional judgment, not to pursue this evidence. See, Burger v. Kemp, ____ U.S. ____ 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987); Strickland v. Washington, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984); Armstrong v. Dugger, 833 F.2d 1430, 1432

(11th Cir.1987); Profitt v. Waldron, 831 F.2d 1245, 1428-49 (5th Cir.1987); Campbell v. Kincheloe, supra, pg. 1101.

[2] In this case, it appears that Mr. Ahlswede's decision not to pursue the petitioner's psychological history was unreasonable, in light of all of the circumstances. At the state evidentiary hearing on this issue, which has been made part of this record by the parties, Mr. Ahlswede testified that he had determined before the guilt phase that the insanity defense would not be viable in this case. Counsel rested his conclusion upon the results of an electroencephalogram performed upon the petitioner, and the resulting interpretation of that test which yielded no evidence of organic brain deficiency. See Exhibit L (Reporter's Transcript of Post-Conviction Hearing, July 12, 1985) at pg. 88. Counsel thus made a reasoned decision not

to pursue insanity as a substantive defense to the crime of murder.

Petitioner's evidence at this Court's hearing on ineffective assistance of counsel has made clear, however, that evidence which may properly be rejected at the guilt phase of a death penalty case must be reexamined in light of the issues presented at the penalty phase. Especially where psychological evidence is concerned, the fact that the insanity defense may not ever be successful as a substantive defense should not automatically preclude consideration of that evidence from the penalty phase. That evidence may well save the defendant from the death penalty, even if it cannot save him from conviction.

In this case, the record shows that Mr. Ahlswede did not consider any psychological evidence in his penalty phase

preparation. Counsel admitted this failure at the state evidentiary hearing:

> Q. You'd agree that you did not satisfy the obligation to investigate fully the potential mitigating factors. Isn't that correct?
>
> A. As regarding his background.
>
> Q. And including potential mental health problems? Yes?
>
> A. Yes.
>
> Q. And including the possibility of intoxication and the amount of intoxication on the night of the defense?
>
> A. Yes.

Exhibit L, pg. 80. Counsel did make a tactical decision not to pursue the insanity defense at the guilt phase of the trial, which is the kind of decision virtually untouchable under Strickland. The record is clear that he made no such reasoned decision with respect to the penalty phase. In deed, he made no decision at all.

If Mr. Ahlswede had delved further into his client's background, he would have discovered evidence that the petitioner was a premature baby, that he had severe medical problems in the first months of life and was not expected to live. The testimony of Dr. O'Gorman at the state post-conviction hearing indicated that premature infants often display various symptoms of organic brain deficiencies, and suffer from other mental problems later in life. Further investigation into the petitioner's background would also have uncovered involuntary commitments to New York psychiatric hospitals, and the records attendant thereto. Investigation of these records would have revealed the fact that the petitioner had been diagnosed as a paranoid schizophrenic on one occasion, and that he had registered positive for organic brain damage on an earlier EEG. There was

therefore a fair amount of important evidence to be uncovered by further investigation into the petitioner's background.

The failure to investigate petitioner's background is especially perplexing in light of the fact that Mr. Ahlswede's only argument to the jury centered around the petitioner's mental state. In essence, counsel posited to the jury the proposition that a sane man could not have committed such a violent and brutal murder. Therefore, he contended, his client was not a candidate for the death penalty because of his mental infirmity. This appeal to the jury regarding the petitioner's mental state was the only substantive argument which counsel put forth in the penalty phase. Counsel did contend that no expert evidence was required to establish the petitioner's mental illness, but it

seems that the real reason that no psychological evidence was introduced at the penalty phase was that counsel either never considered doing so or had failed to complete a thorough investigation which would have uncovered such evidence. This failure to pursue evidence was therefore not based upon a reasonable tactical decision of counsel, and was therefore ineffective. See, Burger v. Kemp, _____ U.S. _____, 107 S.Ct. 3114, 3124, 97 L.Ed.2d 638 (1987) (reasonable decision that psychological evidence should not be used not ineffective); Profitt v. Waldron, supra, pg. 1102, at 1249 (failure to investigate psychological background where insanity was the only available defense was ineffective under Strickland.)

[3] Having determined that counsel's performance at the penalty phase did not measure up to the first

Strickland plank, the Court must now decide whether the petitioner was prejudiced by counsel's failure to pursue this evidence. In determining whether prejudice exists, the Court must determine whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, supra, pg. 1100, at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. In this case, the Court cannot say that there is a reasonable probability that the psychological evidence which would have been represented would have changed the outcome of the penalty phase.

At the evidentiary hearing held by this Court, the respondents presented the testimony of Dr. Master, a psychiatrist from Las Vegas familiar with the peti-

tioner's case. Dr. Master interviewed the petitioner in 1977 at the request of Mr. Ahlswede, who had obtained a court order for such an examination. In Dr. Master's opinion, the petitioner has an anti-social personality, which is unrelated to mental illness. Specifically, Dr. Master indicated that the petitioner lied at various times during the examination in order to make his story more likely to result in a finding of mental illness. Further, Dr. Master indicated that the petitioner lacked the classic symptoms of psychosis: Hallucinations; inability to think logically; and loss of memory. Based upon his review of the petitioner, the witness found the petitioner in 1977 not to suffer from any mental illness. This opinion was conveyed to Mr. Ahlswede.

Dr. Master did not have available to him in 1977 the New York medical records

and other psychiatric history in dispute here. He did, however, review these documents before testifying at this Court's hearing. Based upon that review, Dr. Master found that the 1963 New York diagnosis of the petitioner's mental illness was mistaken. His conclusion was that the state of psychiatry, especially where alcohol related disfunctions are concerned, has advanced significantly since the 1960s, when the petitioner was first diagnosed as having a mental illness. Dr. Master reemphasized that the diagnosis in 1963 of schizophrenia was correct to the extent of psychiatric knowledge at the time. Taking into account recent advances in the filed, however, the witnesses found the old diagnosis unacceptable. Additionally, Dr. Master interpreted the early EEG, and found that it was actually normal. He did indicate that portions of the EEG

tape were illegible, and that that could have accounted for the early diagnosis of organic brain disfunction. Thus, Dr. Master disagreed with the finding of the New York hospitals that the petitioner suffered from a mental illness. Instead, Dr. Master stated that the petitioner was a violent individual who lacks a social conscience.

Dr. Master also disagreed with Dr. O'Gorman, the psychiatrist who had examined the petitioner in 1977. As stated above, Dr. O'Gorman testified in the state post-conviction proceedings that the petitioner did suffer from an organic brain disfunction. Although Dr. Master indicated that he has a great deal of respect for Dr. O'Gorman, he did testify that O'Gorman's diagnosis of organicity was mere speculation. Dr. Master pointed to the weight of psychiatric evidence he had previously dis-

cussed, and stated that the previous diagnoses of organicity were unfounded.

Thus, it appears that the petitioner would not have gained much if Mr. Ahlswede had investigated his psychiatric background to the extent required by Strickland. The substantial weight of the psychiatric evidence presented to this Court indicates that the petitioner is not menally ill, and that he instead lacks a social conscience. The Court is aware that the petitioner need not have been diagnosed as having a full fledged mental illness in order for the psychiatric evidence to help avoid the death penalty. In this case, however, it appears that the evidence would have stood an equal chance of harming the petitioner's case more than it helped. A jury, presented with evidence tending to show that the petitioner was abused as a child, and that he failed to develop

normal social senses, could easily find that these facts did not outweigh the aggravating circumstances presented by the state. Indeed, it seems likely that telling the jury that the petitioner lacks a social conscience is likely to be found as an aggravating circumstance itself. See Whitley v. Bair, 802 F.2d 1487, 1495 (4th Cir.1986) (in a markedly similar case, the court found that the introduction of psychiatric evidence had an equal potential to tip the scale of justice toward death, instead of in the petitioner's favor); Thompson v. Wainwright, 787 F.2d 1447, 1454 (11th Cir.1986), cert. denied, ____ U.S. ____, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987) (none of the psychiatric evidence presented indicated that the petitioner suffered from a specific disturbance at the time of the crime which might have mitigated his participation) cf.,

Armstrong v. Dugger, 833 F.2d 1430, 1434 (11th Cir.1987) (prejudice found where evidence indicated that the petitioner suffered from epileptic seizures, organic brain damage, and mental retardation). In light of the extremely equivocal nature of the psychiatric evidence which the jury in this case would have heard, the Court cannot say that there is a reasonable probability that the outcome of the penalty phase hearing would have been different had the evidence been produced.

This conclusion is buttressed by the evidence of aggravating circumstances which the jury did hear. Specifically, the jury heard evidence that the petitioner had committed one other violent sexual assault. In addition, it heard evidence that the murder was committed during the commission of another felony--namely, robbery. Further, the prose-

cution introduced evidence of the violence which was involved in the killing of the victim of this murder. Specifically, the jury learned that the petitioner smashed the victim's head in with a rock or other hard object with such violence as to render the head almost unrecognizable. In addition, there was testimony that the petitioner sexually assaulted the victim while she was alive or dead. In view of the fairly heinous nature of the crime in this case, it seems unlikely that such weak psychiatric evidence would have spared the petitioner from the death penalty. Thompson v. Wainwright, supra, pg. 1100, at 1453 (where testimony of the brutal torture murder of the victim was presented to the jury, there was no reasonable probability that psychiatric evidence would have altered the jury's decision); Celestine v. Blackburn, 750 F.2d 353, 358 (5th

Cir.1984), cert. denied, 472 U.S. 1022, 105 S.Ct. 3490, 87 L.Ed.2d 624 (1985) (potentially mitigating psychiatric evidence held no reasonable probability of affecting the jury's decision in light of grisly aggravating circumstances). The heavy weight of the aggravating circumstances in this case would have been unaltered by the presentation of the overlooked psychiatric evidence. These counts therefore fail to meet plan two of the Strickland test.

COUNT 1(1)

[4] In this count, the petitioner argues that Ahlswede was ineffective for failing to call the petitioner or any other person as penalty phase witnesses. As stated above, the question for ineffective assistance of counsel is whether counsel made a reasonable decision not to put the petitioner or other individuals on the stand at the penalty phase. In

this case, it does not appear that petitioner's testimony would have had any effect on the sentence if he had testified, and that the prejudice plank is missing from the Strickland analysis. See Strickland v. Washington, supra, pg. 1100, at 697, 104 S.Ct. at 2069 (court can forego determination of ineffectiveness plank if it is easier to dispose of claim on the ground of lack of sufficient prejudice).

With respect to the petitioner's testimony, it is clear that there was no prejudice in failing to put him on the stand at the penalty phase. The petitioner argues that he would have stated that he remembered arguing with the victim, that he had been drinking and smoking marijuana, and that he blacked out. Further, the petitioner would have testified that he did not intentionally hurt anyone. It appears to the Court

that there is no reasonable probability that this testimony would have affected the outcome of the penalty phase. As noted above, the aggravating circumstances found by the jury were both multiple and severe. In view of the heavy weight of these circumstances, the testimony of the petitioner is highly unlikely to have and any effect at all. There was therefore no prejudice in failing to present this testimony to the jury. Cf., Thompson v. Wainwright, supra, pg. 1104.

[5] With respect to counsel's failure to present the testimony of other witnesses, the petitioner has failed to identify specifically who those witnesses would have been and what their proposed testimony would have shown. Without this information, it is impossible for the Court to examine the prejudice plank. In this regard, the petitioner has failed in

his burden of proof. To the extent that the petitioner argues that counsel should have called psychiatric witnesses, including experts and/or family members, the Court has dealt with that issue above. This count therefore fails to establish any basis for relief.

COUNT 1(n)

[6] In the remaining ineffective assistance of counsel count, the petitioner argues that counsel's concession of guilt and argument that the aggravating circumstances were not subject to dispute fell below the Strickland standards. This need not detain the Court for long. It is apparent from counsel's penalty phase argument that he was attempting to shift the focus dramatically to the only mitigating circumstance--mental illness. In so doing, it was almost required that counsel admit that the petitioner committed the act of

murder. In addition, the thrust of counsel's argument was that no sane individual could have committed such a brutal slaying. Thus, it was also necessary not to dispute the aggravating circumstances. Counsel's argument was therefore part of an obvious strategy, and is not a basis for ineffective assistance of counsel. Wilson v. Butler, 813 F.2d 664, 671 (5th Cir.1987), cert. denied, _____ U.S. _____, 108 S.Ct. 1059, 98 L.Ed.2d 1021 (1988) (counsel's concession of guilt at penalty phase not ineffective where part of an obvious strategy).

COUNT 4

In this count, the petitioner argues that the aggravating circumstance of torture, depravity of mind, and mutilation of the victim was unconstitutional as applied to him. Citing Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64

L.Ed.2d 398 (1980), the petitioner argues that this particular aggravating circumstance, and the instructions used to explain it, is unconstitutional as it gives no basis for distinguishing this case, in which the death penalty was imposed, from the many in which it was not. Id., at 433, 100 S.Ct. at 1767.

Nevada Revised Statutes § 200.033(9) provides that first degree murder may be aggravated if the jury finds that the murder involved torture, depravity of mind, or the mutilation of the victim. In this case, the jury was specifically instructed as to the definition of each of the three elements of § 200.033(9).*

[7] As an initial matter, the Court finds that the jury instructions in this case were specific enough in their definition of the aggravating circumstances that the general problems described in Godfrey were avoided. In

Godfrey, the state courts had simply used the terms "torture," "depravity of mind," and "mutilation" without giving them any more specific definition. It was this lack of further definition which resulted in the Court's finding these aggravating circumstances unconstitutionally vague. Id., at 419, 100 S.Ct. at 1759. In the present case, the specificity of the jury instructions removes this case from the general unconstitutionally vague category.

[8] The petitioner further argues, however, that the individual definitional instructions themselves were unconstitutional. Regarding the depravity instruction, the petitioner argues that it allowed the jury to find an aggravating circumstance from the fact that the defendant was legally insane and unable to tell the difference between right and wrong or to appreciate the value of human

life. It appears to the Court, however, that the depravity instruction given by the state courts is not so nearly coequivalent with an insanity instruction as the petitioner suggests. Legal insanity usually requires that the defendant suffer from a mental disease or defect which prevented him from understanding right and wrong. The depravity instruction does not reach such a level of psychiatric sophistication. It merely requires that there be a "condition" of mind such that the defendant lacks a moral sense, and possesses an evil or vile state of mind. Where the concept of legal insanity seeks to destroy the intent necessary to commit a crime, therefore, this depravity instruction seeks to explain more fully the type of intent necessary for the death penalty.

In addition, as stated above, the Courts have recognized that the

petitioner's psychiatric problems can be a two-edged sword. They have therefore held that it is not always prejudicial to leave such testimony out of penalty phase proceedings. See Whitley v. Bair, supra, pg. 1104. Similarly, there appears to be no constitutional impropriety in using the petitioner's depraved state of mind as an aggravating circumstance against him.

The petitioner argues further that the mutilation instruction allowed the jury to find an aggravating circumstance from the "mere" fact that strangulation was the cause of death, rather than a "cleaner" cause, such as a gunshot wound. Initially, the Court notes that the probable cause of death was established as the severe and crushing blow to the side of the skull, which rent the victim's head open on the side. See Deutscher v. State, 95 Nev. 669, 601 P.2d

407, 410-411 (1979). Petitioner's characterization of the victim's cause of death as "mere" strangulation is thus factually inaccurate.

[9] Additionally, the petitioner had sexually abused the victim before or after killing her. There was evidence adduced at trial of sexual assault, and of bite marks on the victim by the petitioner's teeth. It appears that all of the injuries inflicted upon the victim occurred while the victim was still alive, with the blow to the head being the last lethal injury. Id. From the evidence presented in this case, the Court finds that this was not the type of "ordinary" murder which the Godfrey court found ineligible for the death penalty.

Finally, the petitioner argues that none of the justifications for the death penalty should turn on the method of killing where the jury is instructed that

the pain felt by the victim is irrelevant. The Court fails to see the constitutional reasoning behind this argument, and the petitioner cites no federal authority for this proposition. The task of the jury in the penalty phase is to determine whether the defendant's actions warrant his execution. In making this determination, the method of killing is a critical factor. It may be that "clean" methods of murder, such as poison or firearms, do not suffice for the death penalty, where brutally beating the victim to death does. The brutality of the murder therefore has at least as much to do with the mind of the perpetrator as with the pain felt by the victim. That the jury was instructed to disregard the victim's pain is therefore of no moment. Count 4 thus states no basis for habeas relief. In addition, there was no prejudice in failing to raise these

Godfrey claims. County 1(d) is therefore without merit.

COUNT 8

The petitioner finally argues that potential jurors were improperly excluded from the jury pool because of their views about the death penalty. Specifically, the petitioner argues that juror Gossard should not have been excluded, because his views regarding the death penalty were equivocal, and he did not express his absolute opposition to capital punishment. Juror Norris should not have been excluded, in the petitioner's estimation, as the court did not ask the juror whether he would be able to set aside his personal convictions about the death penalty. Neither argument has merit.

[10] In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Court refined the test for

determining whether jurors who were opposed to the death penalty had been impermissibly excluded from capital juries. The court indicated that where a "juror's views would 'substantially impair the performance of his duties as a juror in accordance with instructions and his oath,'" the juror could properly be excluded for cause. Id., at 424, 105 S.Ct. at 852 citing Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). In addition, the Witt court noted that the jurors bias against the death penalty need not be proved with "unmistakable clarity." Id. In view of this standard, neither of the two potential jurors was improperly excluded.

With respect to prospective juror Gossard, the transcript from the jury selection in the case shows that he harbored deep feelings against the death

penalty which would have impaired his ability to function as a juror.

Q. (Mr. Ahlswede)

Now, following those guidelines, do you feel that in no case you could ever impose the death penalty, or do you feel that in a proper case, following those guidelines, you might be able to impose the death penalty?

A. I don't think I could.

Q. Under no conditions?

A. No sir. I don't think I could.

* * * * * * * * * * * * * * * * * * *

Q. (Mr. Harmon)

But we need to have jurors who can consider objectively either the death penalty, life without the possibility of parole in the State Penitentiary, or life with the possibility of parole.

Now, my question is can you imagine any set of facts or circumstances where you feel that the punishment of death was proper?

A. I just put myself in this man's position. That's the only way I can look at it. And I would--I would just have to

say from the time I lived, this time I lived in this area, this time, I just--the death penalty is something I just can't--you known, I could probably make a suggestion, or I could probably deal with it, but I'm really--I guess I really am against the death penalty, you know. There is nothing else I can say.

Q. You are saying you no longer believe in it?

A. No.

Q. In other words, you would automatically, regardless of whatever evidence was presented, you would vote against it; is that what you are saying?

A. Yes. I'd probably have to go that way, Mr. Harmon.

* * * * * * * * * * * * * * * * * * * *

Q. (Mr. Ahlswede)

Could you imagine any circumstances--for example, somebody, an individual going into a school and slaughtering 20 school children? In a situation like that, could impose the death penalty?

A. Well that's another thing. That's another thing that raises a question, if a man does this, I--I look at it today that nine times out of

ten, he's--he's doing this, there's something wrong with him.

Now, I mean, there, if he's going to go in and kill somebody, there must be something, psychiatric problem, or it could be anything at the spur of the moment. Am I supposed to take the man's life? Am I supposed to say he's wrong?

Sure, he's wrong, but where do we all--I mean, lots of us would go off the deep end at some time in our lives. I'm not perfect, and a lot of people are not.

Have to weigh the differences. Might be rehabilitation, might be--sometimes he could be put away nine times out of ten.

The death penalty might work in some cases, but I've seen a lot of times where the death penalty did not, creates a problem, because you hang a man, kill a man, another man takes his place. It's all over again, repertory (sic) of the act.

I don't know really what the guidelines are. I guess newspapers are our worst enemy to some of the people. We read it, we believe it, and so we have to live with it.

Q. So you are saying that you could never under any circumstances at any time impose a death penalty on an individual, no matter how awful the crime was?

A. I never been able to since a few things happened in my life. I just--I just couldn't do it.

The juror's answers to counsel's questions unmistakably indicate his opposition to the death penalty, and his inability to apply it under any circumstances.

The petitioner argues, however, that the juror's somewhat ambivalent response to Mr. Ahlswede's hypothetical involving the 20 school children did not make him a candidate for exclusion under Witherspoon. Perhaps the immediate response to that hypothetical would give the Court pause in this regard. Reading the juror's entire response to that question, however, shows that he was unequivocal in his opposition to the death penalty, and

that he would never be able to apply it, regardless of the circumstances. This juror was therefore properly excluded, as his answers to the relevant questions proved that his opinions regarding the death penalty would have prevented or substantially impaired his ability to perform as a juror.

Prospective juror Norris was also properly excluded. The petitioner argues, however, that the juror was never asked whether he would be able to set aside his personal prejudice and follow the instructions of the court. Review of the transcript reveals that the juror was never specifically asked this question. It does appear from that record, however, that the juror's bias against the death penalty was so evident that this specific question need not have been asked.

> A. I believe that if a man is found guilty, I could send him

to prison for life, but not--
not the gas chamber.

Q. (Mr. Ahlswede)

Do you feel that you could never under any circumstances send anyone to the gas chamber?

A. No, I could never.

The prospective juror's answers were clear and unequivocal regarding his feeling about capital punishment. Asking his questions regarding the judge's instructions appears to have been unnecessary.

It nevertheless appears that questions from the state effectively asked the juror whether he would be able to follow the judge's instructions and set aside his personal bias.

Q. (Mr. Harmon)

But as Mr. Ahlswede set out, if a jury found--the State, as you know, has to prove guilt beyond a reasonable doubt. The Court will tell you what that means legally in this state,

and that is the yardstick that you would use to measure, "Did the State establish beyond a reasonable doubt that that man is guilty of murder in the first degree?"

Then, after that's done, there will be another penalty trial to which there will be probably additional evidence offered, and then the Court would again instruct you as to "This is the yardstick. You determine whether you and 11 other people think that this crime committed by this man of first-degree, if you find that he is guilty of first degree, is worth of, or should the proper penalty be death?"

What I am asking you is could you, with an open mind, look at it, see first if you thought that the proper penalty would be death, and then, if with an open mind you along with your 11 other jurors felt that death was the proper penalty, could vote to impose that penalty on that man sitting right there?

A. I--I don't believe I could just send no one to death. I just don't.

* * * * * * * * * * * * * * * * * * * *

Let me say that I'm not a very religious person, but I do believe in the Bible, and the Bible says thou shalt not kill.

> I just feel like if I could do that, I'm killing someone.

The questions asked by the state thus placed before the juror the role of the judge in giving instructions, and the role of jurors in following those instructions. In response to that question, the juror nonetheless indicated that he could never impose the death penalty, regardless of the "yardstick" given by the judge. The relevant question does appear to have been asked of this juror, therefore. His bias against capital punishment would also have prevented or substantially impaired his ability to function as a juror. There was therefore no Witherspoon error in excusing this juror.

IT IS, THEREFORE, HEREBY ORDERED that the petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED.

IT IS FURTHER ORDERED that the stay of execution entered by the Court in this case shall continue for thirty days from the date of this order, so that petitioner may perfect his appeal, if so desired. At the end of that thirty days, the stay shall expire.

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*The jury was instructed as follows:

INSTRUCTION NO. 21 (torture)
The essential elements of murder by means of torture are (1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion or for any other sadistic purpose. The crime of murder by torture does not necessarily require any proof that the defendant intended to kill the deceased nor does it necessarily require any proof that the deceased suffered any pain.

INSTRUCTION NO. 22 (depravity of mind)
The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is

indifferent to human life. It is a state of mind which is outrageously, wantonly vile, horrible, or inhuman.

INSTRUCTION NO. 23 (mutilation of victim)

You are instructed that the term "mutilate" means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make it imperfect.

APPENDIX C

IN THE SUPREME COURT OF THE

STATE OF NEVADA

HENRY DEUTSCHER,	)	No. 10434
	)	
Appellant,	)	
	)	
v.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

October 18, 1979 601 P.2d 407

OPINION

By the Court, MANOUKIAN, J.:

This appeal is from felony convictions of first degree murder, NRS 200.010 and 200.030, and robbery without the use of a deadly weapon, NRS 200.380, resulting in a death sentence and a consecutive fifteen-year penalty respectively.

Appellant proffers several bases for reversal contending that (1) Nevada's capital punishment statutes are constitu-

tionally infirm; (2) the trial court erred in instructing the jury that it could consider an aggravating circumstance absent respondent's failure to give statutory notice of the circumstance prior to the penalty hearing; (3) his pre-arraignment inculpatory statements made during detention were improperly admitted; (4) probable cause for the arrest was lacking making inadmissible evidence obtained incident thereto; (5) his fifth amendment right to silence was violated due to witness and prosecutorial misconduct; (6) prejudicial privileged and hearsay evidence should not have been admitted; (7) the trial court erred in its refusal to order a police officer to disclose his home address; (8) the evidence is insufficient to support the sentencing jury's findings of aggravating circumstances as required by NRS 177.055; (9) the trial court was without jurisdic-

tion to proceed with the penalty hearing; and (10) error was committed when the trial court, during the penalty proceeding, instructed the jury using an obsolete statutory term. We find no reversible error and affirm.

On the morning of August 16, 1977, the body of Darlene Joyce Miller, 37, was discovered on a desert road off North Nellis Boulevard behind Weaver Construction Company in Las Vegas. Her white 1976 Cadillac with Texas license plates was parked nearby. She was nude except for a blouse and bra that had been pulled open around her shoulders. Her legs were spread apart and there was smeared blood between her upper thighs. She had superficial lacerations and abrasions on her breasts and abdomen which experts testified represented bite marks. Her neck, face and head were severly bruised, bearing extensive abrasive-type injuries.

Her head had a large depression skull fracture two and three-fourths inches in diameter caused by a crushing or blunt type object. A trail of dripped blood led from the crime scene to nearby North Nellis Boulevard, an arterial highway.

Sergeant Samolovitch of the Las Vegas Metropolitan Police Department, the officer in charge of the investigation, was informed by another officer that the victim's car had been parked the previous night approximately one-half mile away in front of the Wagon Wheel Bar on Nellis Boulevard. Upon questioning the bar owner, it was determined that the appellant had been seen with the victim in her automobile, leaving the bar at 2:00 a.m. the morning of August 16, 1977. Appellant was also seen in the vicinity of the bar by his former employer at approximately 6:00 a.m. The victim's body was discovered that morning at 6:30 a.m.

Appellant resided at a motel, also on Nellis Boulevard, which was located approximately one-half mile from both the bar and crime scene. After speaking with appellant's wife at the motel, the investigators went to Deutscher's place of employment to question him. Arriving at about 10:00 a.m., Sergeant Samolovitch noticed a ragged, fresh cut on Deutscher's hand and observed that he appeared nervous, cold and clammy. Sergeant Samolovitch advised appellant that he was under arrest for murder and gave him the Miranda warning.[1]

Deutscher was taken to the police station where he was again advised of his rights and signed a rights advisory card. Appellant was then questioned by the police; he admitted being in the victim's car, but initially denied any responsibility for the murder. When Deutscher was asked if he had any money he took out

his wallet and removed two fifty dollar bills. The two bills appeared to be stained with blood. When asked how the money became stained, appellant did not respond.

After Deutscher was transported to the Clark County Jail on August 16, he was fingerprinted and also consented in writing to a search in the form of dental impressions. Blood samples and fingernail scrapings were also obtained from him.

During a brief interrogation on August 18, 1977, Deutscher admitted killing the victim, but because he wanted to see his wife before making a full statement, the interview was interrupted and his wife was called. After speaking with his wife, a video taped statement was taken that afternoon with Deutscher, his wife, and several officers present. In this statement, appellant admitted having

beaten the victim, describing the crimes in detail.

Appellant had been in custody from 10:00 a.m. Monday, August 16, the date of the offense, until 4:00 p.m. Wednesday, August 18, when the incriminating statement was given. He was arraigned before a magistrate on August 22.

Pertinent evidence at trial included Deutscher's fingerprints in the victim's car, blood of the victim's blood type under the appellant's fingernails, blood at the crime scene of both the victim's and Deutscher's blood type, and identification of the bite marks on the victim as being made by the appellant's teeth. The victim's husband testified that his wife had been carrying two fifty dollar bills, along with other smaller bills in her purse. The two larger bills were not in her purse when the body was found. The appellant's clothes and boots were locat-

ed by police as a result of his confession, and the size, shape and sole pattern of the boots were consistent with those impressions taken at the crime scene. Deutscher's pants, undershorts, and shirt were stained with human blood.

A forensic pathologist testified as to the extent of injuries which the victim incurred, finding no evidence of recent sexual intercourse. The expert did testify that the victim had been strangled and that all the injuries were inflicted while the victim was still alive with the blow causing the two and three-fourths inch diameter hole to the left side of her head being the last and probable "lethal" injury.

Prior to trial, the state served upon the appellant a Notice of Intent to Seek Death Penalty, setting forth certain aggravating circumstances. These aggravating circumstances did not include the

circumstance that the appellant had committed murder in an attempt to commit a sexual assault.

The jury found the appellant guilty of first degree murder and robbery. A penalty hearing was held and the jury was instructed on what they might consider as aggravating and mitigating circumstances in determining the penalty.[2] Over appellant's objection, an instruction was given which provided that the jury could consider the attempt to commit a sexual assault an aggravating circumstance.

The jury concluded that (1) the murder was committed by appellant who was previously convicted of a felony involving the use or threat of violence to the person of another;[3] (2) the murder was committed while the appellant was engaged in the commission of or an attempt to commit any forcible sexual assault; and (3) the murder involved torture, deprav-

ity of mind, or the mutilation of the victim. No mitigating circumstances were designated, the jury simply determining that they did not outweigh the aggravating circumstances.[4]

1. The Death Penalty.

Appellant contends that the death penalty statute is unconstitutionally vague and therefore violative of due process and equal protection as the sentencing procedure permits juries untrammeled discretion in imposing death sentences. See Furman v. Georgia, 408 U.S. 238 (1972).

Nevada's capital punishment law was amended in 1977 with inconsequential revision from the death penalty statutes in Georgia and Florida. Georgia and Florida statutes survived constitutional scrutiny by the United States Supreme Court and satisfied the constitutional deficiencies enunciated in Furman. Gregg

v. Georgia, 428 U.S. 153, 196-207 (1976); Proffitt v. Florida, 428 U.S. 242, 251-53 (1976).

Confronted by an eighth amendment challenge, we have recently held that Nevada's death penalty statutes (NRS 175.552-.562) are constitutional because they "provide for a consideration of any mitigating factor the defendant may want to present." Bishop v. State, 95 Nev. 511, 597 P.2d 273, 277 (1979). See also Gregg v. Georgia, 428 U.S. at 196-97; Proffitt v. Florida, 428 U.S. at 257-58; Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978).

The appellant further contends that the death penalty statute is impermissibly vague because an aggravating circumstance for imposition of the death penalty is that "[t]he murder involved torture, depravity of the mind, or mutilation of the victim." NRS 200.033(8).

These claims were not presented for review in Bishop or Shuman; however, similar aggravating circumstances would provide adequate guidance to the jury. In the instant case, we find the legislative enactment to be plain and intelligible. See Sheriff v. Smith, 91 Nev. 729, 542 P.2d 440 (1975). Moreover, the district court meticulously defined for the sentencing panel, the terms "torture," "depravity," and "multilation [sic]"[5] and the jury was therefore provided adequate guidance for the application of the aggravating circumstances. Gregg v. Georgia, 428 U.S. at 196-97; Proffitt v. Florida, 428 U.S. at 257-58. Moreover, it is well settled that statutes are entitled to all presumptions in favor of validity. Cummings v. City of Las Vegas Mun. Corp., 88 Nev. 479, 481, 499 P.2d 650, 652 (1972). We find no error.

2. Sexual Assault as an Aggravating Circumstance.

The appellant contends that the respondent should have formally notified him, under the provisions of NRS 175.552,[6] that murder committed in the perpetration of a sexual assault would be offered as an aggravating circumstance at the penalty hearing.

We believe that the purpose of the statute is to provide the accused notice and to insure due process so he can meet any new evidence which may be presented during the penalty hearing. Here, evidence was admitted at trial which showed the aggravated nature of the crime committed. The appellant was thus afforded ample notice regarding elements and proof of the offense itself when these were offered during the guilt phase. Eberheart v. State, 206 S.E.2d 12, 17 (Ga. 1974). The notice provisions of the

statute were plainly not offended by the admission of the challenged evidence relating to the aggravating circumstance as the sexual assault was germane to the proof of the crime itself. Furthermore, an instruction regarding sexual assault was given at trial. The accused need not be independently informed of the intended use of this factor during the sentencing hearing. Hooks v. State, 210 S.E.2d 668, 670 (Ga., 1974); Eberheart v. State, 206 S.E.2d at 17; NRS 175.554(1).

3. The Inculpatory Statements Made During Pre-Arraignment Detention.

Appellant next contends that his incriminating statements given to police are inadmissible because, although they were given after his arrest, they preceded his arraignment. Our statutory scheme has long provided that an accused must be taken before a magistrate "without unnecessary delay." NRS 171.178. But while

this court has recognized the statutory requirement, we have also held that in the absence of a statutorily-fixed period of time, a reasonable time is presumed before an arraignment must be conducted.[7] Tellis v. Sheriff, 85 Nev. 557, 560, 459 P.2d 364, 365 (1969). And the mere passage of time, in the absence of prejudice to the defendant, does not constitute a deprivation of a defendant's rights. Id. Appellant was held in custody six days before his arraignment; however, he confessed to the crime after two and one-half days of detention. We find no prejudice as appellant was constantly advised of his rights and acknowledged that he understood them.

In McNabb v. United States, 318 U.S. 332 (1942), and Mallory v. United States, 354 U.S. 449 (1957), confessions which resulted from an unreasonable pre-arraignment detention were excluded be-

cause the confessions resulted from a flagrant disregard of federal procedure. Although we are not bound by these decisions which deal with federal criminal procedure, it is clear that they were intended to avoid the adhesive practices which would spawn from administrative detention without judicial examination. Culombe v. Connecticut, 367 U.S. 568, 584-85 (1960). It has been held, however, that these fears are not valid when an accused, as here, makes a voluntary confession after being fully informed of his Miranda rights. Appellant was informed of his Miranda rights on several occasions prior to his confession, signed a waiver card and acknowledged that he fully understood the import of the waiver. Moreover, the Miranda warning was amplified by the L.V.M.P.D. detectives as follows:

I advised Mr. Deutscher that he

> had the right to remain silent; that anything he said could and would be used against him in a court of law; that he had a right to an attorney; if he could not afford one, one would be provided for him free of charge before any questioning.
>
> I also advised him that if he agreed to talk to us, at any time during that interview he wished to revoke those rights, he had a right also to do that.
>
> Asked him if he understood what I was telling him, that he understood these rights, and he indicated in the affirmative.

Additionally, the several interrogations were of reasonable duration, conducted in a reasonable atmosphere and no irregularities were discernible from the record.

We subscribe to the rule of law which provides that when an accused voluntarily waives his right to silence and his right to counsel, he concurrently waives his right to be seasonably arraigned. United States v. Indian Boy X, 565 F.2d 585, 591 (9th Cir. 1977), cert. denied, 439 U.S. 841 (1978); United

States v. Woods, 468 F.2d 1024, 1026 (9th Cir. 1972), cert. denied, 409 U.S. 1045 (1972); Pettyjohn v. United States, 419 F.2d 651, 655-56 (D.C. Cir. 1969), cert. denied, 397 U.S. 1058 (1970). The reason for this rule is that the primary purpose of an arraignment is to inform the defendant of his rights. But a delay in arraignment is not prejudicial when a defendant has already been advised of his rights, was promptly so advised, and voluntarily waived those rights. See Pettyjohn v. United States, 419 F.2d at 655-56. This is particularly so when the delay is not flagrant and the record is silent relative to any other irregularities which go to the issue of voluntariness. Cf. McNabb v. United States, 318 U.S. at 334-38 (in which defendants in a custodial setting, were interrogated for periods of time in discomfort and without counsel and advice as to the right to

counsel; confessions held inadmissible).

Because the voluntary nature of a confession is the primary test for admissibility, State v. Boudreau, 67 Nev. 36, 46, 214 P.2d 135, 141 (1950), we now focus on whether the pre-arraignment delay affected the voluntariness of appellant's confession. The appellant only feebly challenges voluntariness here. In reviewing the particular circumstances gleaned from the record surrounding the statements and resulting confession, including the education, experience and conduct of the accused, as well as the credibility of the police officers, it is patent that the waivers were voluntary. The subsequent delay in arraignment did not retroactively result in prejudice so that appellant's rights were violated. Morgan v. Sheriff, 92 Nev. 544, 546, 554 P.2d 733, 735 (1976); Brown v. Justice's Court, 83 Nev. 272, 276, 428 P.2d 376,

378 (1967).

4. Probable Cause.

The challenge by appellant of the existence of probable cause for his arrest is also without merit. Probable cause to arrest exists where the facts and circumstances within the officer's knowledge at the time of arrest would warrant a prudent person in entertaining an honest and strong suspicion that the person arrested has committed a crime. Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Gordon v. State, 83 Nev. 177, 179, 426 P.2d 424, 425 (1967); Schnepp v. State, 82 Nev. 257, 260, 415 P.2d 619, 621 (1966). The presence or absence of probable cause is determined in light of all the circumstances and can include conduct of the defendant in the presence of the police officers. A Minor v. State, 91 Nev. 456, 462, 537 P.2d 477, 481 (1975); Schnepp v. State, 82 Nev. at

260, 415 P.2d at 621.

Sergeant Samolovitch testified as to the factual basis upon which his decision to arrest was made: (1) The appellant was seen leaving the Wagon Wheel Bar with the victim the morning of the crime in a car found close to the scene; (2) He knew Deutscher resided at a motel which was close to the bar and the crime scene; (3) A trail of dripped blood led away from the crime scene to Nellis Boulevard; (4) He observed a fresh cut on appellant's finger when he approached him at his place of employment the morning of the crime; and (5) The appellant appeared very nervous, cold, and clammy when he was approached by the officer. It is arguable that each of these circumstances, when taken by themselves, is consistent with innocence. But here, the cumulative suspicion produced by the totality of the circumstances warranted

the finding by the lower court of probable cause to arrest. A Minor v. State, 91 Nev. at 462, 537 P.2d at 480; Schnepp v. State, 82 Nev. at 260-61; 415 P.2d at 621.

5. The Defendant's Fifth Amendment Right to Remain Silent.

Appellant claims there were two occasions during the trial where his fifth amendment right to remain silent was violated. He asserts the first error occurred during Detective Levos' testimony concerning the red-stained fifty dollar bills found in appellant's possession upon which the appellant refused to comment. Following timely objection, the jury was admonished to disregard the testimony.

Although a comment on a failure to respond can be reversible error, the comment must be more than a mere passing reference and an accused must be preju-

diced by the remark to mandate reversal. Shepp v. State, 87 Nev. 179, 181, 484 P.2d 563, 564 (1971); see Layton v. State, 87 Nev. 598, 600, 491 P.2d 45, 47 (1971). Clearly, this was not a purposeful comment by the prosecutor. Cf. Layton v. State, 87 Nev. at 600, 491 P.2d at 47 (prosecutor made prejudicial comment in closing argument respecting defendant's silence). The comment here was by a witness and was a supplemental comment to the answer already given.[8] Considering the vague, passing nature of the remark, coupled with the admonishment, no prejudice to the appellant is shown. Layton v. State, 87 Nev. at 600, 491 P.2d at 47; Shepp v. State, 87 Nev. at 181, 484 P.2d at 564.

The second comment occurred during the prosecutor's final argument when he said, "[The defendant] testified he then -- excuse me. He stated during the video

interview . . . ." This vague reference to the appellant's confession cannot be construed as a direct reference to his failure to testify. Layton v. State, 87 Nev. at 600, 491 P.2d at 47. The established test is whether the language was "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to [respond]." Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955). This non-deliberate, self-corrected statement by the prosecutor does not constitute a sufficient comment to mandate reversal. See Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976).

The final remark, which was made during the state's closing argument, was, "He can sit there and not open his mouth." Our review shows that this remark was in the context of a discussion

of the state's burden of proof. Even though the remark may be improper when taken in context, it becomes inconsequential when, as here, the verdicts are free from doubt. Dearman v. State, 93 Nev. 364, 369, 566 P.2d 407, 410 (1977). The error, if any, on this record of guilt, is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 21-24 (1967).

6. The Hearsay and Privileged Statements.

Appellant contends that inadmissible evidence was admitted during the jury's hearing of a portion of the video taped statement. The challenged testimony consists of remarks by Detective Levos during the video interrogation regarding comments appellant's wife made to police officers.[9] The appellant asserts that the statements are inadmissible because they are privileged spousal communica-

tions, as well as hearsay.

Appellant contends that the officer is placing testimony before the jury indirectly when the wife could not testify against her husband. The spousal privilege,[10] however, is intended to protect confidential communications between spouses, not communications between a spouse and third parties. Foss v. State, 92 Nev. 163, 167-68, 547 P.2d 688, 691 (1976). The privilege cannot be applied to protect communications disclosed, as here, by strangers. State v. Lindley, 502 P.2d 390, 392 (Or.App. 1972).

Hearsay evidence is evidence of a statement made other than by a witness while testifying at the hearing, which is offered to prove the truth of the matter asserted. NRS 51.035. It is inadmissible unless it comes within an exception. NRS 51.065. Respondent argues that the

statements made by the police officer in the video taped interview concerning what appellant's wife had said were not admitted to prove the truth of what the wife had said. Without citing authority, the state contends that the officer's statements "were merely relevant to setting the scene and establishing the circumstances under which the defendant's incriminating statement evolved. It was the statement of the defendant, and not the officer's statements to the defendant, which was offered into evidence." We cannot agree with the state based on the record before us.

Traditionally, hearsay evidence has been excluded because it is not subject to the usual tests to show the credibility of the declarant. Lacking is cross-examination to ascertain a declarant's perception, memory and truthfulness. Moore v. United States, 429 U.S. 20,

21-22 (1976) (per curiam); Donelly v. United States, 228 U.S. 243, 273 (1913). The same problems are present here as to two declarants. First, it is the officer on a video tape making a statement as to what he was told by appellant's wife. Second, the wife has allegedly made certain statements as to appellant's whereabouts on the night of the murder. Appellant's wife was not subject to cross-examination to discover if she indeed said this or as to her memory. Although the officer could have been questioned as to the accuracy of his recollection, it is apparent he was basing his knowledge of appellant's whereabouts upon what someone else had informed him. This is inadmissible hearsay. Toti Contracting Co. v. A. J. Orlando Contracting Co., 181 A.2d 594, 596 (Conn. 1962). Indeed, both of these statements were hearsay. See Archibald v. State, 77 Nev. 301, 307, 362

P.2d 721, 723-24 (1961); Cf. Alexander v. State, 84 Nev. 737, 449 P.2d 153 (1968) (defendant's testimony as to what a friend had said was hearsay). Together, these statements constituted multiple hearsay.

We perceive no hearsay exceptions to what appellant's wife said, let alone what the officer has stated. See NRS 51.065-.375. Additionally, it cannot seriously be argued that the purpose was only to show that the statements were made or conversation had or that they were to show the circumstances of appellant's statements. The officer had even said to the appellant, "Henry, your wife is present in the room. . . . Are you going to make a liar out of her?" If the purpose of these statements was merely to show the surrounding circumstances, we believe they would have been irrelevant. The statements by appellant himself could

have and should have been admitted by themselves.

We must now determine whether the admission of these hearsay statements was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 21-24 (1967); Drummond v. State, 86 Nev. 4, 8-9, 462 P.2d 1012, 1015 (1970); NRS 177.255, 178.598. We note that whether or not appellant's wife did in fact make the statements, there is other uncontradicted evidence placing the appellant at the Wagon Wheel Bar after midnight. Appellant was seen leaving the bar with the victim at approximately 2 a.m. and he was seen near the bar and not far from the murder scene at 6 a.m., shortly before the body of the victim was discovered. In addition, there is overwhelming evidence of appellant's guilt as shown by appellant's possession of two blood-stained fifty dollar bills and testimony

by the victim's husband that the victim had two fifty dollar bills on her person before she was killed. The appellant appeared to have been in need of money; he was quite familiar with the scene of the crimes and entire area whereas the victim was not; there were bootmarks at the scene which matched boots appellant had discarded and an expert testified that the bite marks on the victim were made by appellant. Moreover, blood found at the scene matched the blood-type of the appellant and the blood in the fingernail scrapings taken from appellant was of the same blood type as that of the victim.

All of this is extremely convincing even without regard to appellant's confession or the statement of appellant's wife.[11] While these statements by the wife should have been excluded, we hold that the error was harmless beyond a

reasonable doubt as there was other undisputed inculpatory evidence concerning appellant's whereabouts on the night in question, cf. State v. Rover, 13 Nev. 17, 24-25 (1878) (Beatty, J., concurring) (admission of evidence not harmful where other evidence already established fact), and overwhelming evidence of his guilt. Hendee v. State, 92 Nev. 669, 670, 557 P.2d 275, 276 (1976) (per curiam); Drummond v. State, 86 Nev. 4, 8-9, 462 P.2d 1012, 1015 (1970).

7. The Inquiry into the Detective's Residence.

On cross-examination appellant attempted to ascertain the residential address of Detective Lee. Appellant contends that the trial court's refusal to order disclosure infringed upon his sixth amendment right to confront witnesses. See Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S.

687 (1931). In Brown v. State, 94 Nev. 393, 580 P.2d 947 (1978), we held that the accused's right to a meaningful cross-examination does not establish an absolute right for the disclosure of a witness' address, but rather we would look to the disclosures regarding personal and employment history made by the witness and the extent and nature of the cross-examination. Here, as in Brown, it is of importance that the witness is a police officer and not an informer in that the motive and background of the police officer differs considerably from an informer. United States v. Alston, 460 F.2d 48, 53 (5th Cir. 1972); People v. Pleasant, 244 N.W.2d 464, 466-67 (Mich.App. 1976).

Moreover, the witness gave his true name and occupation, and fully described his professional involvement with the appellant. The detective was also thor-

oughly cross-examined by defense counsel who failed to make a showing how disclosure of the officer's address would make his cross-examination any more meaningful. There is no error.

8. Sufficiency of the Evidence to Support the Death Penalty.

We are required to review imposition of the death penalty pursuant to NRS 177.055 and must consider: "(a) Any errors enumerated by way of appeal; (b) Whether the evidence supports the finding of an aggravating circumstance or circumstances; (c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and (d) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases in this state, considering both the crime and the defendant." The appellant concedes that there is sufficient evi-

dence to support the finding of the first aggravating circumstance, a previous felony conviction involving violence. He contends, however, that the other aggravating circumstances are unsupportable and, without their support, the mitigating evidence outweighs the evidence in aggravation. We disagree.

NRS 200.034(4)(a) provides that only one aggravating circumstance is necessary for imposition of the death penalty. There is, however, substantial evidence to support the finding of the other aggravating circumstances. The attempted sexual assault is supported by such evidence as the victim's nearly nude body, the bloodstains on the victim's body and the appellant's undershorts, as well as the bite marks on the victim's abdomen, breasts, and in her vaginal area.

Similarly, there is substantial evidence to support a finding that the

murder involved torture, depravity of the mind, or mutilation of the victim. There is extensive evidence demonstrating the heinous, brutal nature of the beating which resulted in the death of Darlene Joyce Miller. Considering both the crime and the defendant, we conclude that the death penalty is not excessive or disproportionate to the penalty imposed in similar cases in this state. E.g., State v. Sala, 63 Nev. 270, 169 P.2d 524 (1946). See Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965). Cf. Briano v. State, 94 Nev. 422, 581 P.2d 5 (1978) (life imprisonment); Pinana v. State, 76 Nev. 274, 352 P.2d 824 (1960) (life imprisonment).

Lastly, appellant contends that "the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor." NRS 177.055(2)(c). The record is devoid of any such

evidence.

9. Penalty Hearing Jurisdiction.

Appellant next contends that the trial court was without jurisdiction to conduct the penalty hearing because Chapter 598 of the 1977 statutory amendments, 1977 Nev. Stats. ch. 598, at 1626, repealed the provisions of Chapter 585 of the same amendments, 1977 Nev. Stats. ch. 585, at 1541 (amending NRS 200.030), which prescribed the circumstances under which the capital penalty may be imposed for first degree murder. Both enactments came during the 1977 session, with Chapter 598 passing three days after Chapter 585. There is nothing in the sexual assault legislation which indicates a repeal of the capital punishment law. Indeed, the legislative scheme shows that the two laws are completely separate. Additionally, both laws went into effect simultaneously on July 1, 1977 pursuant

to statute. NRS 218.530. Repeals by implication are disfavored. Ronnow v. City of Las Vegas, 57 Nev. 332, 364, 65 P.2d 133, 145 (1937). We decline to find either an express or implied repeal of Chapter 585.

10. Statutory Terms.

Finally, appellant apparently contends that the trial court committed reversible error when it instructed the jury, using the term "rape" instead of the new phrase "sexual assault." On this record, we perceive no error. State v. Murray, 67 Nev. 131, 147-48, 215 P.2d 265, 273-74 (1950). Although the court used the language of the statute before its amendment, NRS 200.5011 (amended 1977), there is no showing that the use of the term "rape" misled the jury as to a matter of law.

We affirm the convictions of first degree murder and robbery, together with

the judgments and sentences of death plus fifteen years.

MOWBRAY, C.J., and THOMPSON, J., concur.

BATJER, J., concurring:

I concur in the result.

GUNDERSON, J., concurring:

I also concur in the result only.

---

[1]Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

[2]In this factual context Nevada law provides that the penalty panel may return verdicts of death, or life with or without the possibility of parole. NRS 200.030(4).

[3]The previous felony conviction was for attempted sodomy and assault in the second degree, filed in Suffolk County, New York, October 23, 1968.

[4]At the hearings during the penalty phase, the prosecution introduced the testimony of three witnesses. When the state rested, the court inquired of defense counsel whether there were "any mitigation witnesses at this time other than the evidence that was evidenced in the trial?" Counsel replied there were not and rested. The only mitigating factor to which counsel referred in closing was conclusory--namely, that the

murder was committed while the appellant was under the influence of extreme mental or emotional disturbance. The argument was that the acts were the product of a diseased mind in that they were so brutal.

[5] Instruction No. 21:

> The essential elements of murder by means of torture are (1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion or for any other sadistic purpose.
>
> The crime of murder by torture does not necessarily require any proof that the defendant intended to kill the deceased nor does it necessarily require any proof that the deceased suffered pain.

Instruction No. 22:

> The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

Instruction No. 23:

> You are instructed that the term "mutilate" means to cut off or permanently destroy a limb or essential part

of the body, or to cut off or alter radically so as to make imperfect.

[6]NRS 175.552 provides:

> The state may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravating nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing. (Emphasis added.)

[7]In 1979, the Nevada Legislature amended NRS 171.178 and provided for a hearing if an arrested person is not brought before a magistrate within seventy-two hours after arrest. At that time, it will be determined whether a defendant may be released if the person "was not brought before a magistrate without unnecessary delay." 1979 Nev. Stats. ch. 589, § 1, at 1191. Although not applicable to this case, the amendment demonstrates that no fixed time is necessarily prejudicial. Additionally, appellant here, fully informed of his rights, confessed within seventy-two hours of his arrest. No other evidence was obtained from appellant prior to the arraignment and subsequent to these statements.

It is noteworthy that by the time of the trial of this proceeding, Clark County had established the position of intake officer who has the responsibility of assisting an accused detainee by advising him of his various constitutional and legal rights. This includes information as to bail and "anything that would help them to appear in court, and they give them the date of their arraignment when they're to appear in Justice Court, and

they fill out this sheet which helps determine if they need an attorney or public defender . . . ."

[8]The deputy district attorney was questioning Detective Levos regarding his interview of the appellant:

"Q. Did you ask him how the stains got on the two fifty dollar bills?

"A. I did.

"Q. What did you ask him in that regard?

"A. I asked him--I said, 'Then where did the stains from--on the money come from?'

"He didn't answer me."

Defense counsel made an objection, following which the reference to defendant's silence was stricken and the jury admonished. It should be noted, however, that the appellant previously had stated he waived his rights and was willing to give a statement to the police. He had given a statement, responded that he did have money and attempted to explain how he got it. When Detective Levos asked about the stains, the appellant did not answer. Detective Levos' comment at trial was in passing and was a description of all the circumstances. The comment by the police officer here was also not emphasized by the prosecutor.

[9]The testimony was:

> Henry, I interviewed your wife on the morning of the 16th, and I don't

think she was lying to me, but she told me that she hadn't seen you since about 9:30 or 9:45 the night before, when you came home from your mother's. You got a ride home from your mother's, and she went to bed and you went out. She told me that she did not see you since.

[10]NRS 49.295 (1) provides in pertinent part:

(a) A husband cannot be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent.

(b) Neither a husband nor a wife can be examined, during the marriage or afterwards, without the consent of the other, as to any communication made by one to the other during the marriage.

[11]It is significant that the challenged statements here came near the end of the interview after the appellant had given the police virtually all of the inculpatory information.

APPENDIX D

28 U.S.C. § 2244(b):

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

APPENDIX E

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts:

> Successive Petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

ORIGINAL

Supreme Court, U.S.
FILED
DEC 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-753

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RON ANGELONE, Director, Nevada Department of Prisons, and BRIAN McKAY, Attorney General of the State of Nevada, Petitioners

v.

HENRY DEUTSCHER, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent Deutscher believes that the issues raised by the State of Nevada petitioners ("petitioners" or "the State") are more accurately restated as follows:

1. Whether both the District Court and the Court of Appeals abused their discretion in refusing to deny a habeas petition on grounds of abuse of the writ where the initial petition was filed in trial counsel's name, without any involvement of the habeas petitioner; where trial counsel gave no thought to raising any other issues and did not raise his own conceded ineffective assistance of counsel; and where the State opposed the addition to the original habeas petition of the new issues.

2. Whether the Court of Appeals erred in concluding that the deficient performance of counsel at the penalty phase was likely prejudicial where counsel failed to present available evidence of impaired mental status and background and character, failed to object to the prosecution's statements that intent and mental impairment were irrelevant, and erroneously conceded in closing argument the presence of aggravating circumstances and the absence of mitigating circumstances.

3. Whether this Court need review the application by the Court of Appeals of Godfrey v. Georgia and Maynard v. Cartwright where the Court of Appeals' decision on that issue was not necessary to the judgment and where the appropriateness and wording of any depravity of mind instruction will have to be considered at the time of retrial even if this Court does not review the issue.

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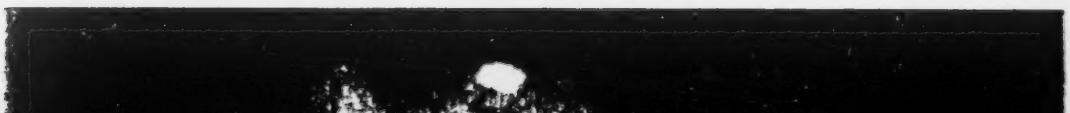

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INTRODUCTION

Respondent, Henry Deutscher, petitioner in the writ of habeas corpus below, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the opinion of the Court of Appeals, reported at 884 F.2d 1152 (9th Cir. 1989).

STATEMENT OF FACTS

Early one morning, the body of a woman was discovered in an isolated area of Las Vegas. She had been strangled and beaten.

The victim had been seen the night before, leaving a nearby tavern in the company of respondent Deutscher. Deutscher was charged with murder in the first degree and robbery without the use of a deadly weapon. Herbert F. Ahlswede, an assistant public defender, was appointed as counsel because Deutscher could not afford counsel of his choice.

The trial court appointed two psychiatrists to determine Deutscher's competency to stand trial. One found serious mental impairment and recommended an EEG to help diagnose any organic cause. When he learned that the EEG report was negative, Ahlswede abandoned the idea of contesting competency or entering a plea of insanity, but did not speak further with the referring psychiatrist. The psychiatrist would have testified that the report was likely a false negative. The psychiatrist would have testified that Deutscher was suffering from a severe mental impairment, probably arising from injuries suffered before birth due to a beating by his father that caused him to be born substantially prematurely. Among other things, the psychiatrist would have testified that this impairment can cause uncontrollable outbursts of violence, particularly under stress and when intoxicated.

The public defender spent 15 or 20 minutes interviewing Deutscher, but would not respond to the efforts of Deutscher's mother and sisters to talk to the public defender and explain Deutscher's background and character. Although disclosed by Deutscher, the public defender did not explore a prior history of voluntary and involuntary civil commitment for mental problems, a history that included a plea by Deutscher to be provided treatment before he hurt somebody and prior incidents of uncontrollable "blackouts."

At the guilt phase, there was no evidence of premeditation, although the prosecution invited the jury to speculate as to motive. A pathologist testified that the bruises and bites occurred while the victim's heart was still beating. He could not determine if any had occurred while the victim was conscious. The jury was instructed that the victim's death was first degree murder, even if "unintentional or accidental," if it was committed "in the perpetration or attempted perpetration" of rape or robbery. The prosecution repeatedly emphasized that intent or premeditation was not necessary.

The jury convicted Deutscher of first degree murder and of robbery.

This was the first death penalty case in Nevada since 1972 and the first experience in the state with a bifurcated death penalty trial. It did not occur to Ahlswede, the public defender, that evidence of mental impairment might be useful at the penalty phase even if it would not likely have resulted in a finding of not guilty by reason of insanity. Counsel put on no evidence at the penalty phase--not the psychiatrist, not the relatives, not the prior treating psychiatrists, and not even Deutscher himself, although his prior conviction was already before the jury as part of the prosecution's penalty phase case. The jury was instructed that possible aggravating factors included a prior conviction of a felony involving use or threat of violence; murder during an attempted sexual assault; and murder involving "torture, depravity of mind, or the mutilation of the victim." As to the latter factor, the jury was instructed in the disjunctive, and the prosecutor argued that any one element alone was enough. The jury was instructed, in part, that "depravity of mind" is "a state of mind outrageously, wantonly

vile, horrible, or inhuman." The statutory mitigating circumstances were listed for the jury, and the jury was instructed to impose a sentence of death unless the mitigating circumstances outweighed the aggravating circumstances.

In closing argument, the prosecution emphasized the contention that only a sentence of death would assure that Deutscher would be separated from society and stated, without objection, that Deutscher's intoxication or lack of intent were not mitigating factors. Ahlswede admitted the aggravating circumstances, admitted that there was no excuse for what had been done, and stated only that "such a sick mind is not to be punished but rather to be pitied." The prosecution responded by pointing out that if there was any evidence of mental impairment, a psychiatrist would surely have been called to testify.

The jury found all three aggravating factors and concluded that they were not outweighed by any mitigating circumstance. Deutscher was sentenced to die.

The Nevada Supreme Court affirmed the conviction and sentence, with two judges concurring in the result only. 601 P.2d 669 (1979). Ahlswede then petitioned in his own name, but purportedly on behalf of Deutscher, for a writ of habeas corpus from the United States District Court for the District of Nevada, raising such issues as a contention that Las Vegas is not part of Nevada and that the instructions improperly referred to "rape" rather than "sexual assault." The District Court denied the writ without an evidentiary hearing.

Ahlswede appealed to the Ninth Circuit, and present counsel was appointed. Present counsel immediately determined that a number of meritorious federal constitutional issues had not been raised by the public defender, including his own ineffective

assistance at trial, on direct appeal, and in the state and federal post-conviction proceedings. Deutscher therefore requested that the case be remanded to the District Court to allow him to file his own petition or to amend the public defender's petition to add the new issues. Deutscher also filed a post-conviction proceeding in his own name in state court. In the Ninth Circuit, and later in response to Deutscher's certiorari petition in this Court, the State opposed remand on the ground that the new issues could be presented in subsequent proceedings. The Court of Appeals denied remand and affirmed the dismissal of Ahlswede's petition. This Court denied the petition for writ of certiorari.

The parties returned to state court to litigate the second post-conviction petition. The state trial court denied requests for discovery and funding of expert witnesses and other resources, but granted a limited evidentiary hearing. The state trial court denied relief, and the Nevada Supreme Court affirmed.

The first federal habeas petition by Deutscher himself was filed in September 1986. The District Court accepted the full record of the evidentiary hearing in state court and granted requests by both sides for supplemental evidentiary hearings. The Court ultimately found that Ahlswede's performance at the penalty phase was below minimal constitutional standards but was probably not prejudicial. The Court rejected, largely on procedural default grounds, a number of other challenges to the penalty phase, including challenges to the depravity aggravating circumstance, the requirement that mitigating factors outweigh aggravating factors, and the failure to require some level of scienter.

The Ninth Circuit reversed the District Court on the question of prejudice, thus mandating that the jury's penalty phase

determination be set aside. In light of the possibility of a retrial, the Court addressed the instructions as to the depravity of mind aggravating circumstance and found them constitutionally deficient.

REASONS FOR DENYING THE WRIT

The State of Nevada petitioners have failed to justify review by Court. The decision of the Court of Appeals is, on its face and in fact, consistent with prior decisions of this Court and of other circuits. The issues raised by the State are fact-specific and are controlled by the unusual aspects of this case. Most of the questions presented as stated by petitioners are not in fact properly raised, and the judgment below would stand on alternate grounds in any event.[1]

A. First Question Presented: Abuse of the Writ

The State contends that the decision of the Court of Appeals presents questions whether a habeas petitioner must prove that he has not abused the writ and whether abuse of the writ may be shown even absent a determination that the habeas petitioner made a conscious decision to withhold claims from a previous petition. These issues are not raised by the decision or record below. The opinion below does not free a habeas petitioner from having to respond to an allegation of abuse of the writ. The Court of Appeals made no such statement; at most it implicitly accepted Deutscher's contention that a separate evidentiary hearing on abuse of the writ is unnecessary where undisputed

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[1]The Court of Appeals erred in affirming the District Court's ruling that procedural default precluded such meritorious federal constitutional challenges as that to the requirement that mitigating circumstances outweigh any aggravating circumstance. That and other challenges would independently support the judgment below.

facts rebutting the State's allegation are already before the District Court.

In addition, petitioners misstate the Ninth Circuit's holding as to the appropriate standard. The Court did not limit abuse to a habeas petitioner's deliberate decision to withhold claims, but referred specifically to action by "counsel" and included not only conscious withholding but also "piecemeal litigation [and actions that] vex, harass, or delay." Appendix A-16. That standard is fully consistent with Rule 9(b) of the Section 2254 rules and with this Court's decision in Sanders v. United States, 373 U.S. 1 (1963). Moreover, it is precisely the standard that the State urged on the Court below. See Responding/Opening Brief of Respondents/Appellees-Cross-Appellants at 10, Ninth Cir. No. 88-2552.

Moreover, abuse is not present on this record regardless of the standard applied. The initial petition was filed in the lawyer's name and without any consultation with the client, in plain violation by counsel of Rule 2 of the Section 2254 rules. The State made no effort to correct that error and involve Deutscher. Prior counsel testified in the state court evidentiary hearing (made part of the federal record by stipulation) that he was not aware of and gave no thought to the issues in question, and he has now been determined to have provided constitutionally deficient assistance at trial by both lower federal courts. Present counsel entered the case shortly after the District Court denied the first federal habeas petition. Counsel immediately identified the missing claims and asked the Ninth Circuit to remand the case to the District Court so that the petition could be amended to add the new issues. Petitioners opposed that request, arguing that petitioner could raise the

issues in a new petition. Appellees' Brief at 7, Ninth Cir No. 82-5831. Counsel who was in fact ineffective at trial should not be allowed to make a decision binding on his client not to raise that issue in a habeas petition, see Osborn v. Shillinger, 861 F.2d 612, 622 (10th Cir. 1988), and petitioners should be estopped from alleging abuse of the writ when it was their actions that kept the additional issues from being added to the initial habeas petition at the earliest possible moment.

Finally, the question of abuse of the writ rests in the District Court's discretion under the plain language of Rule 9(b) and this Court's decisions. See Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986); Sanders v. United States, supra. As the State agreed below, the District Court's decision is reviewable only for abuse of discretion. Answering/Opening Brief of Respondents/Appellees-Cross-Appellants, Ninth Cir. No. 88-2552, at 3. Both lower federal courts have concluded that there was no abuse of the writ, and that conclusion is surely not an abuse of discretion under the unique facts of this case. Even if there had been a showing of abuse, denial of the writ would have been a manifest injustice in light of the now-conceded fact that prior counsel's assistance did not satisfy constitutional standards.

B. Second Question Presented: Prejudice From Ineffective Assistance of Counsel

Both lower courts held, and the State has now conceded, that the performance of trial counsel at the penalty phase fell below minimal standards. The State continues to argue that there was no prejudice. The first part of the question presented by the State is a very narrow issue as to the effect of the prosecution psychiatrist's testimony at the federal habeas evidentiary hearing. Even if the Court of Appeals erred in its conclusion that

such testimony could not have been introduced in the penalty phase, the Court had already concluded that the testimony did not outweigh Deutscher's showing of prejudice. The Court of Appeals did not refuse to consider the psychiatrist's testimony but raised the constitutional issue only as an alternative holding after the Court had fully weighed the psychiatrist's testimony. The fact that the State might have contested the interpretation of the missing evidence as to Deutscher's mental condition and background does not mean that the failure to adduce such evidence was not prejudicial.

The State argues that the Court of Appeals misinterpreted Estelle v. Smith, 451 U.S. 454 (1981). The record, however, does not support that allegation. Even if testimony in the penalty phase by the court-appointed competency psychiatrist would not have been a Fifth Amendment violation, it would clearly have been a Sixth Amendment violation where, as here, counsel had not intended to make mental status an issue at the penalty phase and had not had the opportunity to counsel the client as to the proposed examination. This Court recently made that very point and distinguished the decisions relied upon by the State. Powell v. Texas, 109 S. Ct. 3146 (1989); see Satterwhite v. Texas, 486 U.S. 249 (1988).

The State also complains that the Court of Appeals engaged in "impermissible appellate fact finding." This issue is not worthy of the Court's review. The Court of Appeals did not overturn the District Court on any findings of historical fact, and the interpretation of whether those facts establish prejudice is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). The Court of Appeals merely fulfilled its responsibility to review the District Court's interpretation of

the facts under the proper legal standard. The State does not challenge the standard applied by the Court of Appeals, and below it did not contest Deutscher's contention that the Court of Appeals must apply the standard de novo.

The Court of Appeals' application of the prejudice standard is unremarkable. Counsel's failure to investigate or utilize the available mitigation evidence denied Deutscher his right to have the jury "consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." Penry v. Lynaugh, 492 U.S. ____, 109 S. Ct. 2934, 2951 (1989). Counsel's performance was the functional equivalent of having no counsel whatsoever at the penalty phase.

C. Third Question Presented: Depravity Aggravating Circumstance

The State argues that because it might be precluded on retrial from utilizing the depravity of mind instruction employed at the original trial, this Court should review that instruction at this time. The ruling of the Court of Appeals was not necessary to the Court's judgment.[2] Such interlocutory review is neither necessary nor appropriate. This Court has already provided substantial guidance on the depravity issue, Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980), and the Court of Appeals properly applied those decisions. Moreover, the Court has the issue before it again.

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[2] In fact, the Court of Appeals erred in holding that the invalidity of the depravity aggravating circumstance would not alone require resentencing due to the jury's finding of two other aggravating circumstances. Nevada's statute requires a balancing of aggravating and mitigating circumstances, and the state courts have no established procedure for curing consideration of an invalid aggravating circumstance. Indeed, Nevada courts have generally required resentencing "[b]ecause of the delicate task which the trier of fact has in weighing the mitigating circumstances against the aggravating circumstances. . . ." Dawson v. State, 734 P.2d 221, 223 (Nev. 1987).

Walton v. Arizona, No. 88-7351; Lewis v. Jeffers, No. 89-189. If the law changes, the State will be entitled to argue the effect of any new decisions to the lower court on retrial.

CONCLUSION

For the reasons set forth above, the Court should deny the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED this 18th day of December, 1989.

PERKINS COIE

By _____
David J. Burman

Counsel for Respondent

W9830g

No. 89-753

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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Nevada Department of Prisons, and
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v.

HENRY DEUTSCHER, Respondent

On Writ of Certiorari

to the

United States Court of Appeals

for the Ninth Circuit

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of December, 1989, the Brief in Opposition to Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis were deposited in a United States mailbox, with first-class postage prepaid, properly addressed to the Clerk of this Court. I further certify that on this 18th day of December, 1989, I deposited in a United States mailbox, with first-class postage prepaid, copies of the Brief in Opposition to Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis to Brian Randall Hutchins, Chief Deputy Attorney General, Capitol Complex - Heroes' Memorial Building,

Carson City, Nevada 89710, counsel for petitioner. I further certify that all parties required to be served have been served.

David J. Burman
1201 Third Avenue, 40th Floor
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(206) 583-8888
Counsel for Respondent

Subscribed and sworn to before me this 18th day of December, 1989.

L. Marilyn Rogen
NOTARY PUBLIC in and for the State of Washington, residing at Federal Way.

My appointment expires: 5/4/92

9252G